



Seeking free, prior and informed consent from Indigenous communities for carbon projects

A best practice guide for carbon project developers

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Prepared by the Indigenous Carbon Industry Network

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ICIN acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to the Elders both past, present and emerging.

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Executive Summary

Under the Australian Government's Emissions Reduction Fund (ERF), there are a number of situations where Indigenous people need to be engaged, and their permission or consent obtained in relation to carbon projects. This guide sets out best practice principles based on the United Nations Declaration on the Rights of Indigenous People, for engagement and obtaining free, prior and informed consent (FPIC) in these circumstances. This guide is primarily for potential carbon project agents, aggregators and advisors, defined hereon as project developers, who are operating in Australia's emissions reduction and carbon sequestration industry.

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

FPIC means that consent is:

- **free** from force, intimidation, manipulation, coercion or pressure;
- obtained **prior** to the project starting; and
- obtained after Indigenous people are fully **informed** about the costs, benefits, risks and any other implications of the project, and have the opportunity to seek independent advice.

To effectively obtain FPIC from Indigenous people, project developers should:

- **Work with** established channels within Indigenous communities to identify all affected people and organisations and the appropriate mechanisms for engagement with all of them and their respective representative bodies, PBCs, Boards etc;
- **Engage early** and allow Indigenous people to make decisions **in their own time**;
- Be aware of and respect the **cultural context**: allow Indigenous people to make decisions in their own ways, in languages of their choosing, subject to their own norms and customary laws and decision-making processes. Note that each Indigenous group may have different languages and laws and accept that these may be different to your own expectations;
- **Build relationships** and **trust** through **early and ongoing communication** during the life of the project;
- Ensure Indigenous people have **access to independent advice**;
- Apply the principles of FPIC throughout the **life of the project** from start to finish.

As a matter of best practice, project developers should follow the steps to engage with Indigenous people and seek consent:

- Step 1: Identify who has rights and interests over the project area
- Step 2: Establish appropriate timeframes
- Step 3: Meet with relevant stakeholders and agree on a process for consultation and obtaining consent, including relevant timelines
- Step 4: Agree on the costs of engagement and how these will be covered
- Step 5: Establish a process for dealing with disputes and complaints
- Step 6: Provide information and negotiate details about the proposed carbon project

- Step 7: Hold subsequent meetings and have further dialogue
- Step 8: Obtain agreement on outcomes, noting that a legitimate outcome may be Indigenous people saying no to the project
- Step 9: Monitor and adapt commitments.

For further information, all project developers should consider the Clean Energy Regulator's Native title, legal right and eligible interest-holder consent guidance¹.

¹ <http://www.cleanenergyregulator.gov.au/DocumentAssets/Pages/Native-title-legal-right-and-eligible-interest-holder-consent-guidance.aspx>

Introduction

What is the purpose of this guide?

This guide sets out industry best practice on obtaining free, prior and informed consent (FPIC) from Indigenous communities / organisations for carbon projects under the Australian Government's Emissions Reduction Fund (ERF). In this guide, carbon projects are considered to include both emissions avoidance projects and sequestration projects.

Who is this guide for?

This guide is primarily intended for potential carbon project developers, a collective term for agents, aggregators and advisors, in Australia's emissions reduction and carbon sequestration industry. While not the primary focus, the guide will also be useful for Indigenous people dealing with project developers, non-Indigenous stakeholders and the Clean Energy Regulator in outlining the expectations they can have when engaging in the carbon sector. The guide assumes some familiarity with the ERF and the relevant legislation.²

Project developers should keep in mind that in some circumstances, Indigenous communities may want to develop their own carbon projects and would prefer to invite project developers to assist them as an agent or advisor, rather than project developers taking the lead as the project proponent, i.e. the entity that has the legal right to carry out the project³, themselves.

What is Free, Prior and Informed Consent?

The United Nations Declaration on the Rights of Indigenous People (UNDRIP)⁴ states that Indigenous people have the right to give or deny their free prior and informed consent (FPIC) for projects that affect them, their land and their natural resources.⁵ This includes projects in Australia's carbon industry. The Australian government adopted UNDRIP in 2009.

FPIC has been adopted as best practice by a number of industries in Australia. For example, the International Council on Mining and Metals, which brings together 23 mining and metals companies and 33 regional and commodities associations, has endorsed FPIC in its position statement on Indigenous People and Mining.⁶ The International Finance Corporation requires companies to obtain FPIC from affected communities of Indigenous peoples.⁷ The United Nations Global Compact

² For further information about the Emissions Reduction fund and the relevant legislation see <http://www.environment.gov.au/climate-change/emissions-reduction-fund> and <http://www.cleanenergyregulator.gov.au/ERF/About-the-Emissions-Reduction-Fund>

³ s5, s15 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act).

⁴ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

⁵ Article 32(1) of UNDRIP states, 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.' FPIC is also mentioned in Articles 10, 11 and 28 of UNDRIP.

⁶ International Council on Mining and Metals, Indigenous peoples and mining position statement (May 2013), <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>, accessed 14 June 2017.

⁷ International Finance Corporation Performance Standard 7 (Indigenous Peoples) (January 2012) https://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES; accessed 1 June 2017.

requires businesses to support and respect the protection of internationally proclaimed human rights, including the rights of Indigenous people.⁸ The UN Global Compact has approximately 13 000 signatories including 9 000 companies and 4 000 non-businesses.

FPIC is both a process and an outcome. The outcome is the right to say ‘yes’ or ‘no’ to a project which impacts upon the rights of Indigenous people. FPIC is also a decision-making process and a framework for ensuring Indigenous peoples are properly engaged in any decision that may affect their lands, territories or livelihoods and that outside organisations engage with Indigenous people in a culturally appropriate way.

To ensure consent is granted or withheld appropriately, FPIC has the following principles:

Free from force, intimidation, manipulation, coercion or pressure.

Prior – Get consent before a project application is made and the project is registered. Give Indigenous people enough time to consider all the information before they make a decision about the project.

Informed – Give Indigenous people all relevant information and the opportunity to seek independent advice about the project and its potential impacts and benefits, so their response is meaningful. Give information that is objective, accurate, accessible and easy to understand.

Consent – Indigenous people have a right to say ‘yes’ or ‘no’ to the project. This is a higher standard than the mere right to be consulted. It requires ongoing community participation in the design, development and implementation of the project.

Why should carbon project developers seek Free, Prior and Informed Consent?

FPIC can be applied to any group of people in any decision-making process. There are many different circumstances in which engagement with Indigenous people and obtaining their consent may be required, for example: mining, lease diversifications, development or carbon projects. It is preferable for project developers to be invited by Indigenous communities to develop the project after genuine engagement, rather than assuming upfront that communities will agree to it. After engaging in the FPIC process, Indigenous communities may choose to instead develop their own projects independently, or not develop a project at all.

Where carbon project developers are required to engage with Indigenous communities, applying the process of FPIC makes good business sense and will result in a more socially, environmentally and financially sustainable project. A positive long-term relationship with Indigenous stakeholders is important, given that many carbon projects run for up to 25 years and (in the case of a sequestration project) may require a commitment of up to 100 years.

⁸ UN Global Compact Principles: Principle One: Human Rights, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> accessed 14 June 2017.

In particular, FPIC can promote:

- confidence to the parties involved, and any external stakeholders, that appropriate decision-making processes have been followed and the decision is genuine. Any consent granted for a project without following the principles of FPIC may be challenged and could be unlawful, making poor engagement a potentially costly and risky option for the proponent;
- better long-term financial outcomes and less exposure to governance and project-related risks, such as delay, disruption, shut down, unforeseen costs, legal challenges or reputational risks;
- opportunities to partner with Traditional Owners and benefit from their knowledge and experience in traditional land management practices that may be relevant to the carbon project, such as fire management;
- consistency with best practice in other areas, such as the mining sector⁹;
- compliance with other international standards such as International Finance Corporation safeguards on environmental and social sustainability.¹⁰ Project developers may face obstacles accessing capital if they do not comply with these standards; and
- fair treatment of Indigenous stakeholders consistent with Australia's international obligations under UNDRIP. Investors may choose not to invest in companies that do not follow key human rights principles.

Summary of relevant Indigenous rights and interests

The circumstances under which project developers may need to engage Indigenous people in relation to carbon projects include the following:

- Indigenous people may have a **legal right** to conduct the project activity over the project area or in relation to the resource in question, and as such must be engaged to give permission for the assignment of their legal right to the project developer under a negotiated legal agreement.¹¹
- Indigenous people may be identified as **Eligible Interest Holders**¹² and have a **right to consent to the project** under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act)¹³. This applies to all Native Title determination areas.

⁹ FPIC is endorsed in the International Council on Mining and Metals, Indigenous peoples and mining position statement (May 2013), <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>, accessed 14 June 2017.

¹⁰ International Finance Corporation Performance Standard 7 (Indigenous Peoples) (January 2012) https://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES; accessed 1 June 2017.

Section 46 of the CFI Act provides that, in some circumstances, an RNTBC is deemed to be the project proponent of the project. Where this deeming occurs, the RNTBC is the legal right holder and therefore it must transfer the legal right to conduct the project if it is not to be the project proponent itself.

¹² Eligible Interest in an area of land is defined in s 5 and ss 43-45A of the CFI Act.

¹³ s 28A of the CFI Act. In *Country Carbon Pty Ltd v Clean Energy Regulator* [2018] FCA 1636, the Federal Court held that the requirement in s 28A to obtain eligible interest holder consents applied to all area-based offsets projects (this category comprises both sequestration projects and area-based emissions avoidance projects, such as savanna burning emissions avoidance projects). In that case the Court also held that whether a person has the legal right to carry out an ERF project is a matter to be established to the satisfaction of the Clean Energy Regulator, whose satisfaction must be lawfully formed. In such a case, the Court will not interfere with that determination.

- Finally, Indigenous people may be otherwise **impacted or affected by the projects** and should be engaged as a matter of best practice. One example is Native Title claimants.

The first step for a project developer is to identify the basis on which engagement is required. The second step is to identify the Indigenous people with rights and interests in the land where the carbon project is proposed. It is important to keep in mind there may be more than one relevant Indigenous community or Traditional Owner group who are impacted by the project.

The form and process for obtaining permission/consent will depend on who holds the legal right, the type of right held and any interests in the land. Indigenous people may have a right and/or interest in the land through:

- a Native Title determination (i.e. RNTBCs can be deemed to hold the legal right to conduct carbon projects under s 46 and hold an eligible interest over their Native Title lands);
- a registered Native Title application (i.e. a Native Title claimant);
- consent rights under s43 to 45 of the CFI Act;
- other legal rights under state or territory legislation¹⁴, for example, Aboriginal land in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the NT Aboriginal Land Rights Act).

Native title determination

Native title land is an area of land for which there is an entry on the National Native Title Register specifying that Native Title exists under the Commonwealth *Native Title Act 1993* (the Native Title Act). Native title can be either exclusive or non-exclusive possession¹⁵ native title land. Native title holders are represented by a Prescribed Body Corporate (PBC), also called a Registered Native Title Body Corporate (RNTBC).

On native title land, the PBC is the primary contact point in relation to engagement in regards to both permission (i.e. transfer of legal right where applicable) and eligible interest holder consent with native title holders.

Native title claimants

A native title decision can take a number of years. In order to lodge a Native Title claim and register it, a claim must first pass the registration test and identify the applicant group. Because a Native Title determination does not create any new rights but merely recognises existing rights, it is appropriate that Native Title claimants receive the same rights as Native Title holders in regards to consent.

Legal Right

As mentioned above, Indigenous groups may prefer a project developer to assist them as an agent or advisor, rather than taking the lead in the project. However, if the latter is the case, in order to register an ERF project, a project developer will need to demonstrate they have obtained permission

¹⁴ For example, under the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Act 1991* (Qld).

¹⁵ Exclusive possession native title includes the right to possess and occupy an area to the exclusion of all others. Non-exclusive possession is where native title co-exists with non-Indigenous property rights such as a pastoral lease. See Glossary for more detail.

to transfer the legal right to conduct the project from all parties who had a legal right to undertake the proposed project to the proponent.

In general, the legal right to undertake an emissions avoidance or sequestration project arises from the legal right to access an area and undertake the activity. This legal right may exist in more than one entity at the same time. In some jurisdictions, additional permission under state legislation may be required.

Exclusive possession Native Title entails the right to possess and occupy an area to the exclusion of all others. As such, a registered Native Title body corporate can hold legal right on exclusive possession Native Title land. Non-exclusive possession is where Native Title co-exists with non-Indigenous property rights such as a pastoral lease. (*See Glossary for more detail.*)

In addition to Native Title rights, Indigenous people may hold other forms of legal interests in the land. Land rights are created under specific Commonwealth, State and Territory legislation. These rights can be equivalent to a freehold interest (the Indigenous group owns the land). For example the *Aboriginal Land Rights (Northern Territory) Act 1976* creates a right to inalienable freehold title based on traditional occupation. Project developers will need to carefully check the relevant Commonwealth, State or Territory legislation and ensure that the appropriate consent and engagement process for legal right is conducted.

Eligible Interest Holder Consent

Consent rights under the CFI legislation

In addition to legal right, under the CFI Act, any person or entity with an eligible interest in the land on which the project will run must consent to the project before it can earn credits, including Native Title holders with a registered Native Title body corporate¹⁶. **As a matter of best practice, this should be done before the project is registered.** Given consent from identified eligible interest holders (EIHs) must be obtained before the end of the first reporting period, failure to engage with registered Native Title holders before project registration may present a risk of project revocation in case of non-consent.

Currently, there is no CFI Act requirement to obtain the consent of registered Native Title claimants, where the Native Title claim has not yet been decided. However, as a matter of best practice and relationship building, **it is preferable to obtain the consent of Native Title claimants as well as Native Title holders before** carbon projects are registered, based on the group's applicable decision-making process. Failure to engage with registered native title claimants at the time of project registration may present a risk to projects if a claim is later determined while a consent condition under s 28A of the CFI Act is in place on the project declaration.

The legislation gives limited further guidance on how to obtain consent. Each eligible interest holder must complete an [eligible interest holder consent form](#) which is issued by the Clean Energy

¹⁶ ss 5, 43-45A, 28A of the CFI Act

Regulator. It is also stated under ss 28A(5) of the CFI Act that a form does not apply if the relevant consent is set out in a registered Indigenous Land Use Agreement (ILUA)¹⁷.

Best practice principles and practical steps to seeking free, prior and informed consent

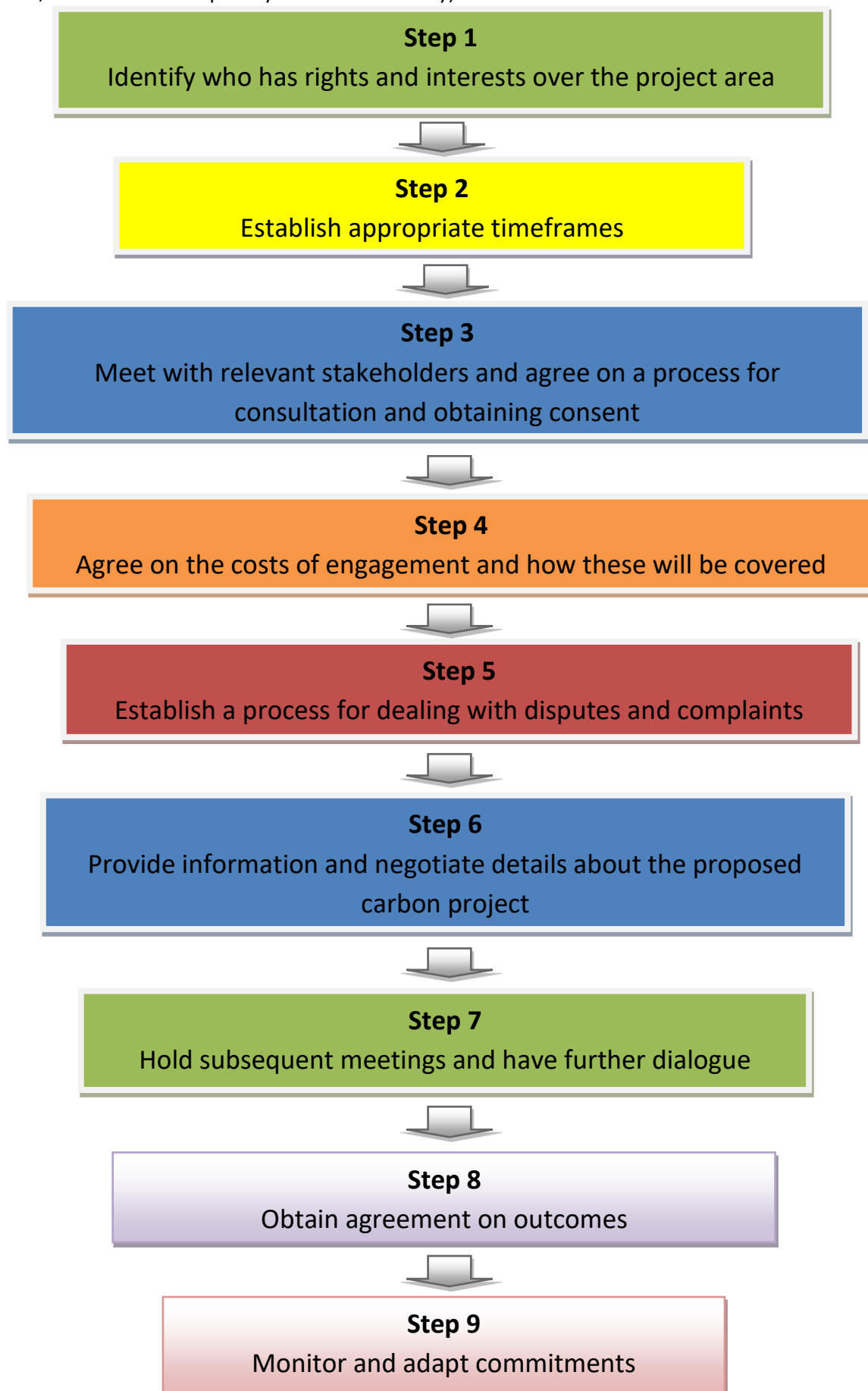
To effectively obtain free, prior and informed consent from Indigenous people, project developers should:

- **Work with** established channels to identify all affected people and organisations, and the appropriate mechanisms for engagement with all of them and their respective representative bodies, PBCs, Boards etc.
- **Engage early** and allow Indigenous people to make decisions **in their own time**.
- Be aware of and respect the **cultural context**: allow Indigenous people to make decisions in their own ways, in languages of their choosing, subject to their own norms and customary laws and decision-making processes.
- **Build relationships** and **trust** through **early and ongoing communication** during the life of the project, including pre-registration, registration, implementation and future management.
- Ensure Indigenous people have **access to independent advice**.
- Apply the principles of FPIC throughout the **life of the project** from start to finish.

¹⁷ Refer to the Clean Energy Regulator's Native title, legal right and eligible interest-holder consent guidance, available at <http://www.cleanenergyregulator.gov.au/DocumentAssets/Pages/Native-title-legal-right-and-eligible-interest-holder-consent-guidance.aspx>

Flow chart summarising practical steps

(note, some of these steps may occur concurrently)



Step 1: Identify who has rights and interests over the project area

Project developers will need to contact Indigenous persons or organisations with a right or interest over the project area to discuss an appropriate process for engagement. To establish who those persons and organisations are, the following actions are recommended:

Actions:

- Search the National Native Title Register to find out if Native Title has been determined over the project area. If **Native Title has been determined**, the relevant PBC should be the main point of contact.
- Contact the PBC to agree on a process for engagement and decision-making.
- If there is a **registered Native Title claim**, contact the local Native Title Representative Body to identify an appropriate engagement and decision-making process.
- If there is **no Native Title determination or registered claim**, seek advice from local Native Title Representative Bodies, community corporations or land councils, on whether there are any other relevant Indigenous interests and agree on a process for engagement and decision-making.
- Consider whether there are **other relevant interests** over the project area, including an Indigenous Land Use Agreement (ILUA). Contact the PBC as per the ILUA.
- Get written confirmation of relevant contact people who may include Traditional Owners, board members, nominated representatives, staff or legal representatives.
- Work with the identified organisation or individuals to agree on a **process for engagement**.

Hints:

- Work through appropriate channels at all times.
- Identify Indigenous people with rights and interests **as early as possible** in the planning stage of the proposal.
- Identify any existing established protocols for consultation in the community.
- Ensure both men and women are included.
- The PBC may advise contacting ranger groups and Healthy Country Advisory Committees who are already involved in land management and may be also involved in activities relevant to carbon projects.
- Contact Native Title Representative Bodies for assistance on identifying the correct people or communities to engage and guidance on cultural customs and contact protocols.
- The decision-making processes within the PBC or other representative body can vary, depending on the type of corporation, its constitution and the nature of the land tenure.¹⁸ Representative bodies such as land councils can assist in advising about decision-making processes in each state and territory.

¹⁸ For example, in Queensland, many Indigenous land trusts have adopted decision making processes in their constitutions to suit their particular cultural circumstances and the number of Traditional Owner groups involved. In some Indigenous Land Use Agreements, native title holders have delegated decision making to existing land trusts, whilst in other ILUAs, they have retained it.

Examples: Identifying relevant legal right holders and eligible interest holders

CarbonCare Pty Ltd wish to register a carbon project. They undertake a search of the Native Title Register and identify that River Country Aboriginal Corporation (River Country), the Prescribed Body Corporate, has exclusive possession native title over the relevant land area. This gives River Country the exclusive right to access and use the land. There are no other registered interests in the land. River Country therefore has the legal right to undertake a carbon project. If CarbonCare want to register a project, they will need to engage with River Country to be assigned legal right to the project. In addition to this, CarbonCare will also need to obtain eligible interest holder consent from River Country under s28A of the CFI Act.

CarbonCare Pty Ltd wish to register a carbon project. They undertake a search of the Native Title Register, and identify that a native title claim exists over the area. CarbonCare Pty Ltd contacts the relevant Native Title Representative Body, who provides information on how the registered native title claimants can be contacted. CarbonCare Pty Ltd makes arrangements to engage with the native title claimants.

CarbonCare Pty Ltd wish to register a carbon project. Savanna Aboriginal Corporation is the leaseholder of the land where the carbon project will take place. The lease gives them non-exclusive rights to access and manage the land, including fire management. There is nothing in the lease expressly prohibiting a carbon project. There is also an exclusive possession native title determination over the area. Desert Mob is the Prescribed Body Corporate for the area. CarbonCare will need to get free prior and informed consent from both Desert Mob PBC and Savanna Aboriginal Corporation to ensure they have legal right and eligible interest holder consent.

Step 2: Establish appropriate timeframes

Consistent with the principle of 'prior' consent, project developers should obtain consent *before* they apply to register the carbon project.

Where consent is required as a consequence of the legal right held by Indigenous communities, or due to the effect or impact the project will have on Indigenous rights, this must be obtained prior to project registration.

For consent required as a consequence of s28A of the CFI Act, conditional project registration can occur prior to obtaining consent. A project can be registered conditional upon obtaining EIH consent prior to the end of the first reporting period (maximum of two years for area-based emissions avoidance projects and five years for sequestration projects). However, if project developers do not engage appropriately and obtain consent before the project is registered, there is a risk it may need to be substantially modified, discontinued or even deregistered / revoked if consent is not obtained.

Project developers may have concerns that the process for obtaining FPIC will add to the duration and costs of project establishment, impacting on timeframes and ability to generate Australian Carbon Credit Units (ACCUs). However, engaging with Indigenous stakeholders early in the project planning stage will avoid project delays, increased costs and reputational risks later in the life of the project. It will also develop mutually agreed processes and timelines, trust and a positive working relationship.

Actions:

- Project developers can save time by making early contact with the PBC or representative body and working with them.
- The timeframes for consultation and obtaining consent will vary, depending on the community's needs, the number of stakeholders, the complexity of the project and the consultation processes agreed between the parties.
- Project developers can save time by making initial contact through the right channels, preparing information and materials and providing these upfront.

Hints:

- Agree timeframes and processes up front, but ensure you are flexible and adaptable if these need to change. PBCs often have multiple, competing commitments and limited resources. It is important to respect this and factor it into timeframes.
- Be aware of significant cultural events or sorry business that may impact on timeframes. It may not be appropriate to engage with stakeholders in these periods.
- Consider local conditions (weather, environmental, economic, remoteness etc.) that may impact on timeframes

Step 3: Meet with relevant stakeholders and agree on a process for consultation and obtaining consent

Actions

Arrange an early meeting with the PBC or other representative body to:

- introduce members of the team
- explain the proposed carbon project (covering the issues in Step 6)
- confirm the land area you are talking about (have maps prepared)
- confirm who you should be dealing with and how you will communicate with each other
- agree on a process and timeframe for engagement, sharing information and decision-making, in consultation with the PBC or other representative body
- record discussion and points of agreement/disagreement
- check with those involved that the record is accurate
- agree issues for follow-up and further discussion.

Hints

- It is important for people to have sufficient time to fully consider the information and make an informed decision.

- Give people an opportunity to discuss the issues with and without project developers after the formal meeting has ended.
- Allow people time to get independent legal advice or independent expert opinions. They may wish to contact their local Native Title Representative Body to access these resources.
- Find out if there are any issues that cannot be discussed in an open meeting of all stakeholders, such as sensitive information or particular traditional customs.
- Ensure all groups in the community, such as women and youth, have a chance to participate fully and effectively.
- There may need to be separate processes for men and women.
- As English may be a second or even third language for some communities, project developers should identify whether an interpreter is required, and if so, provide a qualified interpreter in the appropriate language through the relevant state/territory interpreter service or seek the services of a community interpreter through the local language centre.
- Consider translating communication products into the local language, or at least seek communications advice to ensure information is accessible and in plain English.
- Do not overload people with information at the first meeting.
- Do not expect to reach agreement at the first meeting.
- Maintain engagement with the relevant PBC or representative body rather than engaging with individuals, who may not be the appropriate decision-makers.
- Expert consultants may be able to assist with engagement.

Step 4: Agree on the costs of engagement and how these will be covered

Project developers should be aware of the costs of engagement with Indigenous communities. This can include the costs of organising and attending meetings (such as travel, food and accommodation), onsite visits, independent expert reports or maps of the project area.

These costs will be incurred not just by the project developer, but also by Indigenous people who are being requested to give up their time and expertise to attend meetings or workshops.

Indigenous people will most likely also incur costs in obtaining independent legal advice and other expert opinions before providing their decision. This should be discussed and a decision made on how these costs will be met.

Actions

- At the time of agreeing an engagement process with the PBC or other representative body, parties should identify the likely associated costs.
- Agree on who will meet these costs.
- Negotiate and write up an agreement relating to costs with the PBC or other representative body before any on-ground meetings or visits take place.

Hints

- The agreement should include a section on how to deal with disputes about costs.

Step 5: Establish a process for dealing with disputes and complaints

When undertaking engagement, project developers may encounter disputes with Indigenous stakeholders or disputes between different Indigenous stakeholders.

Actions

- For disputes between the project developer and Indigenous stakeholders:
 - identify formal and informal dispute resolution processes at the start;
 - seek advice from the PBC or other representative body on appropriate dispute resolution methods;
 - use an independent person to resolve a dispute where it cannot be resolved informally.
- Incorporate complaints about potential violations of FPIC into the dispute resolution processes.

Hints

- Indigenous people may not necessarily complain formally if they are unhappy with a process. A complaint or grievance can be expressed in a variety of ways. Accept complaints in all their forms.
- Do not make dispute resolution processes too formal or hard to access.
- Do not impose unrealistic timeframes for resolving disputes.
- Use the feedback obtained from complaints to improve the process for engaging with Indigenous stakeholders and obtaining FPIC.
- Do not become involved in disputes between Indigenous groups.

Step 6: Provide information and negotiate details about the proposed carbon project

Project developers should fully explain all key elements of the project to Indigenous communities and organisations in clear terms, so their response is meaningful and their decision is informed. This includes how the project will affect their access to, use of or rights over the land, plus the benefits and risks as well as any costs that the community may incur, and any other implications.

Importantly, the Indigenous community should be made aware of their rights – including their right to say no to the project and to obtain independent advice. These details will need to be negotiated with Indigenous communities, after they have decided their level of engagement and had the opportunity to get independent advice, talk with the project developer or with other project developers.

Reaching common ground

Project developers should ensure they genuinely understand the Indigenous community's point of view and their priorities for the land or resource (for example, those outlined in existing healthy country plans, Indigenous Protected Area (IPA) or other land management plans). This should include clear communication from the Indigenous community as to how they see these priorities being affected by the project.

The priorities of the project developer and the Indigenous community should be discussed so each party can understand each other and can reach common ground. Project developers should not

assume that Indigenous communities will share their view about the perceived financial and environmental benefits of the carbon project.

The priorities of Indigenous communities may include:

- developing Indigenous owned business opportunities
- employment and training opportunities, for example, through ranger programs
- having control over activities taking place on their traditional lands
- access to and protection of significant sites
- access to country for traditional ceremonies or traditional activities such as hunting and fishing
- promoting opportunities for intergenerational exchange of traditional knowledge as well as building skills and training of young people
- preservation of natural ecosystems that support significant plants and animals of the region as well as the maintenance of cultural connections and stories.

How much information to give?

The amount of detail in the information that the project developers will need to provide will vary, depending on the nature of the Indigenous community's legal interest in the land and their interest in the project. Project developers will need to give more information where Indigenous communities are more actively involved in the project and will therefore assume a greater level of risk.

At a minimum, the project developer should provide information about the following:

What is the context for the project?

- What is climate change?
- What is the method being used, and is it emissions avoidance or sequestration?
- What is the goal of the project/method and the basic science behind it?
- How will the project help to reduce greenhouse gases or sequester¹⁹ carbon?
- Background on the Emissions Reduction Fund and the CFI Act.
- What is an ACCU?

What is being requested from the Indigenous community?

- Are they being asked to give permission and transfer the legal right to undertake the project?
 - What form must this transfer take?
 - What is the scope and duration of the transfer being requested?
 - Be clear that permission cannot be easily withdrawn at a later stage, and about the consequences if the assignment of legal right is disputed or indeed withdrawn.
- Are they being asked to provide eligible interest holder consent under the CFI Act?
 - what does the Eligible Interest Holder form mean?
 - who has to sign it?
 - what does the person agree to by signing it?
 - where is this information held?
 - If the eligible interest holder consent is to be contained in a registered ILUA, be clear about the process that will apply until the ILUA is registered.

¹⁹ Carbon sequestration is the long-term storage of carbon from the atmosphere into the landscape.

- Be clear the consent cannot be withdrawn at a later stage (unless done while a s 28A condition is still in effect over the project declaration).

How will the project impact on the community's rights?

- What rights are they giving up – for example the right to establish a project themselves
- What is the location of the project and land area being covered?
- What rules apply to the project?
- How long do they apply for (including permanence period implications)?
- Are there restrictions on what the community can and cannot do to the land during the life of the project?
- Will there be restrictions if there are major land use changes during the life of the project, such as mining or irrigated agriculture projects?
- How does the project impact on traditional cultural rights, access to the land and the community's ability to carry out traditional hunting, fishing and fire management practices?

What are the risks and benefits of the project?

- What is the length of the project and the timeframes?
- What are the operational costs of the project? For example, for a fire burning project, does the community need to meet the cost of fire operations?
- Are there ongoing costs for record keeping, auditing and reporting and who is responsible for these?
- What are the financial, cultural and environmental benefits of the project? How does this vary over time?
- How many ACCUs is the project expected to earn and what is the basis for that projection?
- What is the expected profit/loss?
- What are the risks if the project is forced to end or it has low or negative returns?
- What are the consequences of non-compliance with applicable legislation?
- What happens if there are major land use changes, such as mining, and the project needs to be amended or revoked?²⁰
- Where applicable, what are permanence obligations, when do they arise, how long will they last, and what happens if they are not complied with?
- How will the risks be managed?
- What governance structures need to be in place?

Project developers should do cost-benefit modelling which sets out the estimated costs and returns. There should be enough information for the community to decide if the costs of the project will outweigh the benefits.

Providing independent third-party advice about the project

- In order for Indigenous communities to make an informed decision, they will likely need to obtain independent third-party advice about the project.
- The project developer should be prepared to give guidance on how to access independent expert advice and reports, including legal advice.

²⁰ This is particularly relevant for sequestration projects.

- It is important that everybody has agreed how the costs of the advice will be paid.

Where Indigenous communities are more actively involved in the project, give additional information about:

Details of the project and how it will work in practice

- method being used
- crediting period
- delivery schedule of any proposed ERF contract
- for aggregated carbon projects-the other parties to the project
- where applicable, permanence obligations²¹, their implications, and make-good contracting arrangements²²
- permitted carbon activities

What are the governance arrangements for the project?

- Who will make decisions about the project?
- How will decisions be communicated to Traditional Owners?
- Who will manage the project once it is set up?
- Who will be involved in implementing the project?
- How will this be resourced?

What are the sales arrangements for the project?

- How will ACCUs be sold?
- Who will receive the income generated?
- Who will make these decisions?
- How will these decisions be communicated?
- Who will bear any contract delivery risk if not enough ACCUs are produced?

Hints

- Get advice from, or engage with, local representative bodies or ICIN on how to present the information, considering the level of familiarity the broader community has with carbon projects.
- Present the information in a way that is accessible and easy to understand. It is not enough to just give copies of complex and lengthy documents such as project reports and feasibility studies without any explanation.
- Assume that independent advice will be required, and factor this in to project costs and timeframes.
- Consider using maps, plans and visual aids.
- Give information verbally and in writing.
- Use plain English, minimise jargon and explain complex terms.
- Present information in the relevant Indigenous languages or use interpreters if required.

²¹ A permanence obligation means the carbon stored by a project must be maintained for the chosen period.

²² A common contractual tool requiring parties to fulfil their obligations through alternative means when they cannot satisfy the original terms of the contract.

Step 7: Hold subsequent meetings and have further dialogue

Actions

- Follow up with further meetings and communication.
- The number of meetings will depend on the complexity of the information, the level of the community's understanding and the agreed consultation process.
- Use a variety of methods to share information, as agreed with the relevant decision makers. For example, notice boards, newsletters, meetings with representative bodies, internet and social media and smaller discussion groups with community representatives.

Hints

- Project developers should be genuinely open to ideas or changes to the plan, including alternative locations. Invite comment and suggestions. Do not lock in ideas and plans before engaging stakeholders.
- Follow through with agreed actions – this is important to build trust in communities.
- Be responsive, show respect, and act in good faith.
- Continue the dialogue and contact with Indigenous communities throughout the planning, development and implementation phases of the project.

Step 8: Obtain agreement on outcomes

Once the *process* for FPIC has been followed, the *outcome* is for the Indigenous community to decide:

- *whether* they want the proposed project to proceed; and
- if so, *how* they would like the project to proceed.

If the Indigenous community says 'no' to the project, the project developer will not be able to proceed with it. In some circumstances, the community may say 'no' to the project proposed by the developer but may want to run their own carbon project. If the community says 'yes', the FPIC process will need to continue through the project planning phase.

For eligible interest holder consent, a signed written consent agreement is a procedural step but is not an end in itself. If there has been genuine informed consultation, conducted in good faith, the person giving consent should fully understand what they are consenting to by signing a written agreement.

Actions

- Agree on how consent will be given. This includes both the process and the actual indicators that consent has been achieved (e.g. letter from the PBC; Indigenous Land Use Agreement).
- Consult the Clean Energy Regulator's *Native title, legal right and eligible interest-holder consent guidance* to ensure that the proposed form of consent meets CER's requirements, noting that the CER makes a number of recommendations on when ILUAs should be used to obtain consent.

- Document the consent and provide a brief summary of agreed actions so all parties have a record that is relevant and useful to the parties.
- Under the ERF, eligible interest holders will need to sign an [eligible interest holder consent form or enter into an ILUA](#). Project developers will need to submit copies of additional agreements or ILUAs negotiated during the process of seeking consent to the Clean Energy Regulator.
- In other cases, the person(s) giving consent may need to sign another form of written consent agreement.

Step 9: Monitor and adapt commitments

As carbon projects can last for up to 25 years, engagement processes should be dynamic and may require adjustments as circumstance and outcomes change over time. Project developers should periodically review the terms of their agreement with the community and monitor the engagement processes throughout the lifecycle of the carbon project, not just at one point in time.

Actions:

- Develop a monitoring and evaluation framework for decision-making and engagement processes.
- Decide how often the project will be assessed.
- Identify who will lead the evaluation.
- Use the feedback obtained from complaints and monitoring to improve the process for engaging with Indigenous stakeholders and reaching agreement.
- Use the feedback from monitoring to evaluate and adapt agreed commitments at defined points of the project and when there are unforeseen changes.

A best practice example for seeking consent

CarbonCare Pty Ltd want to register a savanna burning carbon project. Local Indigenous rangers were already undertaking fire management activities in the area as part of traditional ‘right way burning’. The project area is on non-exclusive possession native title land and Southern Sky Aboriginal Corporation is the Prescribed Body Corporate (PBC).

CarbonCare contact the PBC through the relevant Native Title Representative Body (NTRB). CarbonCare engages the NTRB to facilitate a meeting between CarbonCare and the directors of the PBC. CarbonCare provide resources for the PBC to have an independent advisor present at the meeting. The PBC invites Traditional Owners and rangers to the meeting, which is held on country.

At the meeting, CarbonCare, with the assistance of the NTRB, explain climate change, the nature of the carbon project, what fire management activities would be done as part of the project, how the project would affect the community’s access to the land, how it overlaps with the work already being done by rangers and what income and other benefits the project could generate for the community. Community members have an opportunity to ask questions and state their point of view.

At the end of the meeting, representatives from CarbonCare summarise the issues which were discussed and agrees on a process with the PBC directors for further consultation.

The PBC takes a few weeks to discuss the project with Traditional Owners and consider how the project would benefit the community and future land management. The independent advisor provides them with further information, including risks, benefits and other alternative models. The priorities of Traditional Owners are identified, including whether, and to what degree, they would like involvement in the carbon project. Based on this, the PBC develops a governance arrangement for the project which fits in its existing governance structures.

A couple of months later, at another meeting with CarbonCare, the PBC gives its consent to register the project, subject to a number of conditions that CarbonCare incorporated into their project design.

In this example, by initially approaching the local NTRB, then the PBC, the project developer was able to get consent from the correct parties. The project developer worked with the PBC within its existing governance structure to consult with Traditional Owners. By involving the ranger network, the project developer could benefit from their expertise in fire management. Through an inclusive consultative process, Traditional Owners felt a sense of ownership of the project.

An example of poor practice

Carbon Projects Pty Ltd wanted to register a reforestation carbon project. The area is pastoral lease on exclusive possession native title land. BYD Aboriginal Corporation is the Prescribed Body Corporate. Local Indigenous groups were already undertaking similar land management activities in the area.

Carbon Projects gave short presentations to various community organisations in the project area but did not engage with BYD Aboriginal Corporation or local ranger groups. The presentations gave limited information about the project.

Following engagement, Carbon Projects sought the consent of Mr Jones, a well-respected community member who had been active in discussions and asked him to sign the Eligible Interest Holder consent form. Mr Jones did not have the authority to sign the consent form. Despite this, Carbon Projects went ahead and registered the project with the Clean Energy Regulator.

In this example, the project developer sought permission from a person who appeared to, but did not actually have, legal authority, to consent to the project. They instead needed permission from the PBC, BYD Aboriginal Corporation, who represents the interests of relevant native title holders, including Mr Jones. The project developer did not do any background research on who it should seek consent from. It did not consult with Indigenous groups who were already undertaking similar activities and could have assisted or provided advice. The project developer did not use existing consultation processes or authorised channels for obtaining consent and only dealt with select individuals who did not have the authority to consent. There is a question about the validity of the consent obtained which puts the project at risk.

Glossary

Native title terms

Native Title recognises the traditional rights and interests to land and waters of Aboriginal and Torres Strait Islander people under the *Native Title Act 1993* (Cth) (the Native Title Act). Native title claimants can make an application to the Federal Court to have their Native Title recognised by Australian law. Native title may co-exist alongside other rights such as holding a pastoral lease or mining lease.

Native title (exclusive possession) includes the right to possess and occupy an area to the exclusion of all others. Exclusive possession Native Title is recognised over limited parts of Australia such as unallocated vacant or Crown land or areas that were previously held or owned by Indigenous people.

Native title (non-exclusive possession) occurs where Native Title co-exists with non-Indigenous property rights such as a pastoral lease, across areas where there is a shared interest with another party. Non-exclusive possession Native Title rights and interests are listed in the Native Title determination. Examples may include the right to live on the area, hunt, fish, gather food or teach law and custom on country.

Native Title Representative Body (NTRBs) are organisations appointed under the Native Title Act to help Indigenous people with all aspects of their Native Title claims. NTRBs are appointed by the Department of the Prime Minister and Cabinet to cover a region in Australia and include land councils. Increasingly, land councils, which include NTRBs, are taking on broader roles as service providers to PBCs.

Native Title Service Providers (NTSPs) are funded to do the same work as NTRBs in areas where no NTRB is appointed.

Prescribed body corporate (PBC) is a corporation nominated by a group of Indigenous people to hold and manage (as trustee or agent), their Native Title rights and interests when that group has succeeded in having their Native Title recognised in a Federal Court determination. PBCs have prescribed characteristics under the Native Title Act.

Registered Native Title Body Corporate (RNTBC)

Once registered by the National Native Title Tribunal, a PBC is technically known as an RNTBC.

Indigenous Land Use Agreement (ILUA) is a legally binding agreement between parties under the Native Title Act covering how a body of land or water will be used or managed. It is registered with the National Native Title Tribunal and is binding on future generations of Native Title holders, for the duration of the agreement.

Carbon project terms

Aggregators are individuals or organisations (such as agents, project developers, holding companies) who bring multiple carbon abatement projects together. Aggregators provide a range of services that support participation in the Emissions Reduction Fund.

Australian Carbon Credit Unit (ACCU) is a tradeable unit that represents one tonne of Carbon Dioxide Equivalent emissions avoided. Under the Emissions Reduction Fund, ACCUs are issued by the Clean Energy Regulator for registered projects under the ERF once the project can demonstrate that the abatement (from projects that reduce greenhouse gas emissions or increase carbon stored in vegetation or soils) has been realised. If the eligible interest holder consent condition under s 28A of the CFI Act applies to a project declaration, no ACCUs will be issued for the project unless all applicable eligible interest holder consents are obtained and the condition is removed by the Clean Energy Regulator.

Crediting period is the time over which a carbon project can earn carbon credits. It varies by project type or method. For example, a savanna burning carbon project under the Emissions Reduction Fund has a 25-year crediting period.

Delivery schedule forms part of the Emissions Reduction Fund contract. It sets out the date when a project will deliver ACCUs to the Clean Energy Regulator and how many ACCUs (volume) it will deliver over the entire period of the carbon abatement contract.

Emissions avoidance projects are a type of emissions reduction project which aims to avoid or lessen greenhouse gases. An example is a savanna burning carbon project where greenhouse gases are reduced or avoided by changing the timing, intensity and size of fires in the landscape.

Emissions Reduction Fund (ERF) is a voluntary Australian Government scheme that provides opportunities for land managers and companies to earn money from reducing their greenhouse gas emissions or storing carbon in vegetation and soil.

Method/Methodology is a set of rules for each type of ERF carbon project, agreed to by the Australian Government. A Method prescribes how to set up, run, monitor and report on a carbon project, the information to record and keep, and how to calculate the amount of greenhouse gas emissions avoided or sequestered by the project.

Permanence obligation means a requirement for the carbon stored by a project to be maintained for the chosen period. Under the ERF, this is either 100 or 25 years. They only apply to sequestration projects.

Right Way Fire is a term used to describe traditional fire management practices passed down and used by Indigenous people. Traditional Owners undertake right way fire in the early dry season to put in place strategic fire breaks to stop the intensity and spread of late dry season wildfires, and to manage and protect country and important places.

Sequestration project is a type of emissions reduction project which stores carbon in vegetation or soil.

Links to further resources

AIATSIS

Summary explaining what are Land Rights and Native Title rights in Australia

<https://aiatsis.gov.au/explore/articles/land-rights>

National Native Title Tribunal

<http://www.nntt.gov.au/assistance/geospatial/Pages/Maps.aspx>

Maps of Native Title claims and determinations.

<http://www.nntt.gov.au/searchRegApps/Pages/default.aspx>

Summary information about Native Title determinations, applications and decisions. Includes links to extracts from the Schedule of Native Title Applications for all applications which have not been fully determined. Provides information about future act applications and decisions associated with future act determinations.

Registers providing detailed information on Indigenous land use agreements, Native Title determinations and applications that have been accepted for registration:

[Search Register of Native Title Claims](#)

[Search National Native Title Register](#)

[Search Register of Indigenous Land Use Agreements](#)

Prescribed Body Corporates/ RNTBCs

Profiles and location of all PBCs/RNTBCs by State/Territory; links to Native Title Representative Bodies and Native Title Service providers: <http://www.nativetitle.org.au/profiles.html>

Emissions Reduction Fund

<http://www.environment.gov.au/climate-change/emissions-reduction-fund>

<http://www.cleanenergyregulator.gov.au/ERF/About-the-Emissions-Reduction-Fund>

Clean Energy Regulator

Native title, legal right and eligible interest-holder consent guidance

<http://www.cleanenergyregulator.gov.au/DocumentAssets/Pages/Native-title-legal-right-and-eligible-interest-holder-consent-guidance.aspx>