



Submission

Code of Conduct Review (2020)



PREPARED BY CLIMATE FRIENDLY FOR

CMI Code of Conduct Review

1 June 2020



Summary

Climate Friendly welcomes and supports many of the key recommendations from the Review, including:

- Congestion busting for signatories, particularly around minimising overlap with matters covered by the carbon farming legislation and AFSL requirements
- Improving customer experience with the carbon industry, particularly in relation to Native Title Holder consent processes and for individual land managers who may require independent advice
- Establishment of an expert advisory panel to support Code Administration.

Below are some more specific comments on some key recommendations made in the review by Chapter.

Chapter 2 - The Code

Consumers

We support the recommendations to clearly define “consumers” of the Code, as we believe this will help to target the focus of the Code as it moves to the operational phase and also to help consider whether it is appropriate to expand coverage to other types of businesses and advisers. We understand that the primary consumer who the Code was initially designed to protect is carbon project proponents, as the Code was drafted by the Carbon Project Developers Council with that consumer in mind. If this definition is to be expanded, then this would likely necessitate a broader array of amendments to the Code to sufficiently apply to other types of business and advisers.

Eligible Interest Holder (EIH) Consent

In relation to the recommendations around EIH, we suggest further clarity is needed about what types of EIH these recommendations are related to. It appears these recommendations are primarily related to Native Title EIH, rather than the broader set of EIH that might be required to provide consent on a project. For example, the review recommends that consent is provided by EIH prior to project registration. Most financial institution and state government EIH require a copy of the project declaration in order to commence or at least finalise the consent process. As such, making this a requirement for all EIH would not be in line with the commercial requirements and processes of some EIH.

To the extent that the EIH recommendations are only intended to relate to Native Title Holder EIH, we welcome them. Climate Friendly has obtained 18 Native Title consents related to carbon farming projects. We note that the ICIN guidelines provide high level guidance and principles, but it could be beneficial for the Code to continue to develop more practical tools to demonstrate how these guidelines can be implemented. This process may be different depending on the mix of stakeholders involved in the project and the project method. For example, how Native Title consent to a project on Aboriginal leasehold land may require a different interaction between the Aboriginal Corporation and the Native Title Holders, compared to a project with a pastoral leaseholder. A savanna project may also require

some different steps in the consultation and planning processes compared with a regeneration project, given the savanna project involves planned burns on land which may intersect with cultural practices, as opposed to a regeneration project which involves a decision not to suppress native regeneration of forest but less active management.

An example of Climate Friendly's typical Native Title EIH process for a regeneration project is set out at Annex I. This process is subject to customisation with each individual EIH group, and in our experience the same group may even elect to follow a slightly different process for granting consent to a different project. Our process for obtaining these consents is closely aligned with the ICIN guidelines, and we believe it sets out a pathway for operationalising them in the context of a regeneration project which involves a pastoral lease and a native title determination.

In our experience the consent process has multiple steps, and signature of the Australian Government EIH Form is often the last step. Different forms of permission are given incrementally at different stages in the process. The pre-registration phases confirm an interest in discussing the provision of carbon farming consent, and the parties' agreement to participate in a defined consultation process, clarifying expected steps, timing and costs. Alternatively, the first registration phase could result in active dissent, although we note that Climate Friendly has not experienced active dissent to a carbon project, as generally these projects are around regenerating land and improving the health of country, so they are well aligned with the goals of the Native Title Holder groups that we have engaged with to date.

Finally, we also note that the ICIN guidelines do not provide any specific guidance on dealing with claimant groups that do not yet have determined native title. This poses an extra set of practical challenges, as there is often not yet an entity that has legal standing to negotiate a consent on behalf of a Native Title group, so while dialogue can occur it is extremely challenging to enter into formal agreements.

AFSL and sales options guidance

The Review recommends that CMI assist stakeholders accessing ASIC's guidance on AFSL requirements and also provide guidance on options for selling credits. We welcome congestion busting as part of the Code update and links, as opposed to duplication, with any AFSL requirements.

We caution CMI and the Code Administrator to carefully consider what guidance it is able to provide around sales options, as there is a risk that such guidance on a financial product could become a financial service which requires an AFSL. To the best of our knowledge CMI is not a licensee, and so our understanding is that CMI could only provide links to general market information, platforms that facilitate sales and service providers who hold an AFSL and may not be able to provide more specific information on sales options.

Model contracts

The Review also recommends CMI provide advice on model contracts. While in general we welcome availability of templates, there are a wide variety of different carbon project business models and participants. In our experience, each of these can necessitate different legal structures and agreements. There could also be some risks to the Code Administrator in providing guidance on legal templates if such templates lead to disputes for Signatories and consumers. It may be preferable to provide general guidance on key provisions that should be addressed in an agreement, and/or options for their inclusion, as opposed to specific legal contract templates.

ERF project data

The review recommends that the CER make data available to the Code Administrator. While in general we welcome electronic and automated processes, we are unclear on the utility of this recommendation. Aspects of projects reviewed by the CER should not need to be the subject of review by the Code Administrator, and as such we are not clear what data the Code Administrator would require access to that could not be provided by the Code signatory. Additionally, ERF project reports to the CER contain a wide array of data which is subject to privacy laws and should not need disclose to the Administrator in order to perform its functions. We welcome further clarity on the purpose of such a data exchange and information about what further data is needed to assist in determining whether that is useful mechanism. Climate Friendly manages all our project data in an in-house purpose-built database, and should data be required for a Code report we do not envisage needing to access it from the CER.

Chapter 5 - The Code Administrator

Firstly, we congratulate the CMI on implementation of the Code to date in the foundational phase. Regarding the recommendation that the CMI continues to administer the Code going forward, we would welcome more information about what alternate options were considered since these are not outlined in the Review. While we think the CMI has done a professional job at facilitating the drafting and launch of the Code, we have some reservations about whether the CMI can continue to effectively represent its member group, while also regulating members of that group who are Code signatories and arbitrating over any disputes as the Code becomes more mature. As such, we would like to understand what alternative models or organisations were considered given the report does not provide information on any other options (while it does provide some good guidance on steps CMI would need to take were they to continue on as Code Administrator). Any concern expressed in this regard is not intended to express dissatisfaction with CMI, but rather owing to the significant value we place on having CMI act as an advocate for the carbon industry, and we would not want to see Code Administration curtail that impact or compete for advocacy resources.

Annex I: example Native Title Holder EIH Process

Steps pre-registration:

1. **Identification:** identify the native title for any proposed project in the due diligence phase
2. **Notification:** notify the relevant representative body of any proposed project which shows determined native title interest or registered native title claimants as soon as possible once a decision is made that the project is technically eligible and the pastoral lessee has confirmed their interest in progressing with a project
3. **Information pack:** provide an information pack to representative body or the groups appointed legal adviser to distribute to the Native Title Holder group about carbon farming, Climate Friendly's operations and the proposed project prior to the initial meeting
4. **Process and cost estimate:** following instructions from the Board, representative body / appointed legal adviser provides an estimate of the group's
 - process and timeframes for the consultation and consent process
 - estimate of costs and how these will be paid
5. **Board meeting:** seek an initial meeting, through representative body / appointed legal adviser, with the board of the group with a view to:
 - re-confirming the process, costs and timeframes for the consultation and consent process
 - explaining the information pack and the process for dealing with any questions
 - laying out the initial offer of the pastoral lessee or options in simple terms (especially where group has already achieved carbon agreements)

Subject to Native Title Holder timing and availability, the following steps may occur pre-registration or after registration but prior to project audit:

6. **Site visit:** Climate Friendly takes two representatives nominated by the group to the prospective property to meet the leaseholder and undertake a one to two day inspection of the property.
7. **Second Board meeting/s (as required):** further discussion about the landholder agreement and any instructions received in relation to it (including attendance by pastoral lease holder if appropriate).

These steps typically occur after project registration, as agreement signatories typically want confirmation of project registration in order to finalise the agreement.

8. **Native Title Holders meeting** (if required): group takes the MOU and Landholder Agreement to a meeting if that is the direction of the Board.
9. **Execution:** execute any agreements (typically an MOU with Climate Friendly and a Landholder Agreement with project proponent and Climate Friendly) and EIH consent forms required by CER

Project audit and first ACCU issuance occurs after agreements finalised.