Independent Review of the Australian Carbon Industry Code of Conduct

April 2020

2 Executive Summary

In mid-2018, the Carbon Market Institute (CMI) implemented the voluntary domestic Carbon Industry Code of Conduct (Code). The Code was designed to promote market integrity, consumer protection and accountability for industry practitioners and service providers.

The Code was created with the support of stakeholders from the industry, government and the community, who contributed to its content and development. The Code provides guidance for project developers, agents, aggregators and advisers involved in carbon offset schemes including the Emissions Reduction Fund (ERF) and voluntary offset schemes.

The CMI was appointed to be the Code Administrator (the Administrator) during the Foundation Stage which ends mid-2020. The Code transitions to its Operational Stage on 1 July 2020.

Since the Code's launch, the Queensland government has been a valuable support of the Code, and has implemented the Land Restoration Fund (QLRF) which limits investment applications to Code Signatories or to parties engaging Code Signatories. Making Signatory status a condition of entry into a statutory scheme valorises the Code.

The Climate Solutions Fund (CSF) was announced in February 2019 with the aim of boosting the supply of carbon units from carbon projects of all sizes across the economy.

The Climate Active program has resulted in over 120 carbon neutral certifications which have produced over 15 million tonnes of carbon offset. Over the last twelve months, certifications have increased by 50%.

These developments reinforce the nationally important role of the Code in fostering and sustaining best practice in carbon project management and the growing marketplace of carbon offset advisors.

This independent review of the Code identifies the preparatory measures that can be taken to ensure a successful transition to the Operational Stage.

During the Operational Stage, a Code Review Panel comprising independent members will act as an arbiter of cases and appeals. Various elements of the Code will be delivered including compliance audits, breach and complaints handling and the enforcement of sanctions.

The Terms of Reference required consultation with Signatories, the Carbon Market Institute and relevant stakeholders including the Department of Environment and Energy and the Clean Energy Regulator (CER).
The Review's key recommendations are:

(1) Congestion busting for Signatories

The activities of many Signatories draw them into the heavily and increasingly regulated zones of the financial services and carbon farming regimes. There is no need for the Code to duplicate the compliance or reporting obligations of the other regimes for those particular Signatories. However, there is a compelling need to identify the common areas of regulation and chart a clear path for the Code Administrator and Signatories to follow. The result should be a reduction in their administrative and economic burdens without compromising the integrity of the Code or the reputation of the industry.

(2) Clients

The Review provides recommendations that address the complex issue of eligible interest holder (EIH) consent for land-based ERF projects. Suggestions have been made to reframe best practice EIH consent in a culturally and commercially appropriate way. Other recommendations are made to ensure that the development of trading in co-benefits by Clients, Signatories and secondary market participants occurs fairly and cooperatively.

(3) The Code Administrator

Recommendations have been made that should ensure adequate resourcing of the Compliance function during the Operational Stage. In line with the effort to 'congestion bust' the complex web of regulations, the Code Administrator will need to develop its capabilities and leverage the skills and expertise of the Code Review Panel more than originally anticipated in the next few years. Recommendations have also been made to provide a robust, fit-for-purpose governance framework.

(4) The Code Review Panel

As noted above, it is suggested that the Panel provide a greater role in the initial years of the Operational Stage by providing a second review of proposals from the Code Administrator to apply severe sanctions or suspensions. The recommendation should result in a skills transfer from the Panel to the Administrator and protection for Signatories from a no-regrets strengthening of decision making. In addition, the Panel should review the administrative performance of the Code Administrator and have regard to the adequacy of resources and the stakeholder experience.

3 List of Recommendations

Chapter 2 – The Code

1. It is recommended that the Code Administrator clearly define ‘consumers’ in Code amendments.
2. It is recommended that the Code clarify in section 2.3(3)(d) that best-practice requires EIH consent to be obtained prior to the registration of area-based ERF projects, consistent with the guidance of Indigenous Carbon Industry Network (ICIN) for “seeking free, prior and informed consent from indigenous communities for carbon projects” – a best practice guide for carbon project developers.
3. The Review recommends the above best-practice standard on an ‘if not, why not’ basis. It is recommended that Signatories be obliged to report against the best-practice standard on the ‘if not, why not’ basis in their ‘Annual Report (Self-Audit Checklist)’. The ‘if not, why not’ approach requires a Signatory to report the reasons why they did not achieve the Code’s best-practice standard. The Signatory should report the strategy adopted to obtain consents from EIHs and the reasons why consent could not be obtained prior to project registration. The Code Administrator could then assess whether the Signatory’s approach was credible and consistent with the Code’s ‘open and appropriate interaction’ objective and the community trust principle. In addition, it would provide demand-side participants with a cue for a meaningful dialogue about EIH consent.
4. It is recommended that Signatories consider the financial and cultural advantages of taking into account the ‘active dissent’ of EIHs in relation to area-based ERF projects.
5. It is recommended that the Code provide guidance aimed at ensuring fair and transparent benefit-sharing arrangements between clients (the originators of the co-benefit) and Signatories for projects generating co-benefits.

6. It is recommended that the Code modify the requirement to provide the information outlined in section 2 in ‘plain English’, and instead require that a Signatory use the medium of communication that is linguistically and culturally appropriate for the audience and their level of maturity in the carbon market.
7. It is recommended that the Code Administrator assist Signatories and stakeholders in accessing ASIC’s guidance on the need for an AFSL.
8. It is recommended that the Code Administrator provide guidance on the options for selling carbon credits.
9. It is recommended that the Code define the different types of Signatories.
10. It is recommended that supplementary materials linking Section 2 of the Code to the objectives in sections 1.1 and 1.3 of the Code be provided.
11. It is recommended that the Code define its version of ‘market integrity’.
12. It is recommended that the Code Administrator provide guidance for written agreements via model contracts for each of the various types of arrangements entered into by Signatories and clients.
13. It is recommended that the Code Administrator review the Code’s vision of ‘significantly contributing to Australia’s greenhouse gas commitments under the Paris Agreement’.

14. It is recommended that the Code Administrator be given the discretion to recognise and rely on the business practices and compliance measures a Signatory has implemented to meet its AFSL obligations, subject to the Signatory demonstrating:

- the applicability of its AFSL to its carbon project customers;
- the duplication of its AFSL and Section 2 obligations and monitoring;
- the quality of its business practices; and
- the effectiveness of its compliance measures.

Whilst this recommendation pertains to Section 2 of the Code, it can be effected via an amendment to Section 3.4.

15. When applicable, it is recommended that the Code Administrator and Signatory review the above arrangement annually, or in the event that the Signatory ceases to be licensed, whichever is the earliest. This requires an amendment to section 3.4.

16. It is recommended that the Code Administrator develop the capabilities necessary to support its discretionary role in determining the relevance and effectiveness of Signatories' AFSL compliance measures.

17. It is recommended that The Australian Financial Complaints Authority (AFCA) be added to the list of Consumer Protection Organisations in section 5.1 of Appendix 1 of the Code. In addition, the CMI and the Code Administrator should consider promoting AFCA's complaints and dispute resolution role for retail consumers on the Code of Conduct website.

18. It is recommended that section 2.4(2)(d) of the Code specifically refer to 'Section 3' of the AFMA Code to clarify that it provides guidance on dealings with and advice to wholesale customers.

19. It is recommended that Section 2.3 clarify that where the Signatory is an ERF proponent for a project, the overlapping Code obligations of Section 2.3(3) and (4) are not applicable in relation to the particular project/s. Signatories who are project proponents in the ERF are already required to comply with the offset reporting, audit and record-keeping requirements under the Carbon Farming Initiative (CFI) Act. Duplication of these obligations for Signatories acting as ERF proponents for some or all projects is not necessary.
20. It is recommended that the Code Administrator should focus its compliance monitoring activities on any residual Code requirements that are not already covered by the CFI Act and subordinate legislation in order to reduce administrative burden for both the Code Administrator and the relevant Signatory.
21. It is recommended that the Code Administrator refer to the ERF project and contracts registers published on the Clean Energy Regulator's website where possible to minimise administrative burden on clients. The Code Administrator should request the Clean Energy Regulator to consider making available project data to facilitate the automation of Signatory Annual Reports to the Code Administrator.
22. It is recommended that the development of model contract provisions and/or model agreements for Australian Carbon Credit Units (ACCUs) be informed by the legal standards and procurement policies of its government and major corporate stakeholders.
23. It is recommended that the CMI continue positioning Signatories as trusted, ethical suppliers in the ACCU supply chain.
24. It is recommended that the Code of Conduct webpage/s link to the relevant QLRF and QRIDA webpages to facilitate the uptake of independent advice and to promote consumer protection.

25. It is recommended that Section 2.5(1)(a) of the Code be amended to add: “If the Signatory takes on the role of ERF project proponent, the written agreement between the Signatory and customer must provide for orderly succession of the project proponent, consistent with the environmental and social integrity of the Scheme and with the relevant laws.”

Chapter 3 – Administration of the Code

26. It is recommended that the Code Administrator provide guidance to Signatories on best-practice standards for timely self-reporting of material breaches.
27. It is recommended that Signatories be provided with the opportunity to provide feedback on whether the Code should be amended so that it clarifies the timing for self-reporting of major and severe breaches.
28. It is recommended that the Code Administrator set expectations on the timing of Signatory breach reporting. In principle, a Signatory should be the first to report on its own breaches to the Code Administrator (as opposed to hearing about it from other Signatories or the media).
29. It is recommended that Section 2.6 of the Code be amended to include positive guidance on Signatories’ professional relationships with each other, emphasising that their conduct as a group must support the Code’s integrity and reputation, and that Code Signatories be seen as a principled group that acts ethically and with integrity.
30. It is recommended that the Code Administrator provide further guidance for Signatories on developing feasibility advice, risk assessment plans and conducting stakeholder consultations.
31. It is recommended that the Code Administrator provide checklists and handouts to assist small- to medium-sized carbon service providers in complying with Section 2 of the Code.

32. It is recommended that the Code Administrator publishes information on a Client Hub on its website that could be accessed by clients.
33. It is recommended that the CMI work with both the Commonwealth Government and state governments to increase awareness in the legal and banking sectors of the benefits of carbon projects.

Chapter 4 – The Code Review Panel

34. It is recommended that the Panel member selection process have regard to the skills and experience needed by the Panel as a whole. In addition, the nomination, screening and appointment of Code Panel Members should be undertaken by a Nominations Committee whose members are drawn from key Code supporters.
35. Optional: it is recommended that Section 3.2(2) of the Code be amended so that it lists the skills and experience that the Panel as whole requires, and deletes references to 'representative'.

Chapter 5 – The Code Administrator

36. It is recommended that Signatory fees be reviewed annually and take into account inflation, the financial benefits of Signatory status, the variable resources required to implement the Code, and the level or financial support provided by Code stakeholders. In line with the CMI being a not-for-profit, the need to recover costs, net of other funding, should guide Signatory fee levels.
37. It is recommended that the CMI administer the Code of Practice during the Operational Stage.

38. It is recommended that a conflicts of interest framework be implemented if the CMI is appointed to administer the Code.
39. It is recommended that in the first three years of the Operational Stage of the Code, the Code Administrator implement a procedure to refer proposals to apply severe sanctions or suspensions to the Code Review Panel. During that time, publication of severe sanctions and suspensions should not occur until the Code Review Panel affirms the Code Administrator's proposal. The Code Review Panel's decision will hold.
40. It is recommended that the Code Administrator implement appropriate controls to manage the security and confidentiality of its information assets.
41. It is recommended that the Compliance Manager's reporting line provide them with ongoing high-level sponsorship and access.
42. It is recommended that the Code Administrator's performance be reviewed every three years as part of the tri-annual independent review. The decision to re-appoint the Code Administrator (or not) should be informed by this review, the views of the Code Review Panel in its Annual report, and through broader stakeholder consultation. To give this effect, it is recommended sections 3.1(1), 3.10(4) and 3.10(5) of the Code be amended.

Chapter 6 – Miscellaneous

43. It is recommended that more than one entity can become a Signatory to the Code under the one Signatory fee, subject to those entities being companies within the same corporate group.
44. It is recommended that a supporter category be created. It is also recommended that the CMI do further consultation with corporate stakeholders participating in both the demand-side and supply-

side to gauge their level of interest in becoming supporters of the Code, rather than Signatories to the Code.
45. It is recommended that the Code Administrator inform the Australian Financial Markets Association and the Clean Energy Regulator of the contractual needs of demand-side participants, to facilitate the modification of contracts for the trading of co-benefit branded ACCUs.
46. It is recommended that the CMI on behalf of the Code Signatories pursue funding from government and other key stakeholders to support the continued, efficient, shared regulation of participants in the Australian carbon industry.

4 Chapter 1 – Introduction and Background

4.1 About this review

The Carbon Market Institute (CMI) was established in 2011 to assist parties to meet their mandatory or voluntary emissions reductions obligations at least cost. The CMI also facilitates carbon market opportunities for service providers and promotes Australia as a hub for carbon market activity in the Asia-Pacific region. In 2020, the CMI continues to advocate for efficient and effective carbon markets and related policy solutions. It works with its members to develop the carbon industry so that it generates significant economic, indigenous, social and environmental benefits for Australia, and in particular for regional and rural communities.

The CMI launched the Carbon Industry Code of Conduct (Code) in 2018. The Code's vision is to achieve a well-functioning emissions reduction and carbon sequestration industry in Australia at the scale required to significantly contribute to Australia's greenhouse gas reduction commitments under the Paris Agreement.

The Code governs the conduct and business processes of Signatories participating in 'schemes' which are defined as the Emissions Reduction Fund (ERF) and other voluntary offset schemes including the Gold Standard, the Verified Carbon Standard and the Clean Development Mechanism.

Climate Active (formerly the National Carbon Offset Standard) certifies the carbon neutrality of businesses that achieve zero net emissions via technology, operational change and the purchase of carbon offsets. Certifications under Climate Active account for over 15 million tonnes of carbon offsets and certifications have increased 50% over the last twelve months.[1] To be certified under Climate Active, only carbon offsets that result in genuine emissions reduction can be used and they must be cancelled on an official register. The list of offsets eligible under Climate Active includes ACCUs, CERs, VERs and VCUs.[2]

The ERF has invested over $2 billion in Australian businesses and organisations to adopt practices and technologies that reduce or offset greenhouse gas emissions. ERF projects contribute to Australia meeting its emissions reduction target and comprise the great majority of carbon projects undertaken in Australia. Building on the ERF, the Australian Government has recently established the Climate

[1] https://www.climateactive.org.au

[2] https://publications.industry.gov.au/publications/climate-change/system/files/pages/b6b73a02-1a6c-4d77-bb11-e12c44f759c4/files/guidance-offsets-eligible-offsets.pdf

Solutions Fund (CSF), providing a further $2 billion to purchase low-cost abatement and contribute to Australia's 2030 emissions reduction target.

4.2 Review and scope of work

Section 1.6(4) of the Code requires that an Independent Review of the Code be undertaken prior to the commencement of the Operational Stage, in order to appropriately consider and implement the transitional requirements necessary for elements of the Code to come into effect.

Section 1.6(4)(a) of the Code requires that the Terms of Reference have regard to matters such as the Code, Code reporting, the Code Administrator, establishment of the Code Review Panel and the Code Review Panel Terms of Reference, and following consultations with Signatories to the Code.

4.3 The Reviewer

Section 1.6(4)(b) of the Code requires that the Review will be undertaken by a suitably qualified, independent person/body, the Reviewer. The Independent Reviewer appointed to lead the review is Ms Virginia Malley FAICD. Virginia has over 30 years' experience in the design, execution and oversight of strategic governance, risk management and compliance frameworks for financial and environmental institutions. Ms Malley worked at Macquarie Bank from 1987 to 2012 where her roles included Chief Risk Officer of the Macquarie Funds Management Group. Her other current roles include Deputy Chair of the Biodiversity Conservation Trust of NSW, member of the Board of the Clean Energy Regulator, the boards and committees of Perpetual Superannuation Ltd, Perpetual Equity Investment Company Ltd and Morphic Ethical Equities Fund Ltd, and Chair of the Pinnacle Fund Services Compliance Committee.

Ms Malley has been appointed to this role independently of her current roles and appropriate non-disclosure agreements have been put in place to protect the privacy of information shared by Signatories and other stakeholders in her capacity as the Independent Reviewer.

The Review's secretariat, led by Taira Vora, is also covered by similar arrangements to ensure independence and confidentiality of process and information for the duration of, and following, the review.

4.4 Consultation

Section 1.5(4)(c) of the Code requires consultation with Signatories to the Code, the Code Administrator and with relevant stakeholders including the Department of Environment and Energy and the Clean Energy Regulator.

The Review consulted extensively with Signatories, landholders, indigenous carbon industry groups, co-regulators, state governments and demand-side corporates from November 2019 to April 2020. Stakeholder views were sought at individual meetings and via written submissions. At the time of writing, the Review had received and incorporated feedback from 37 Signatories and stakeholders.

The Terms of Reference required consultation with the Signatories and key stakeholders, all of whom participated in the Review:

- The Carbon Market Institute
- Aboriginal Carbon Foundation
- Agriprove
- AI Carbon (RegenCo)
- Alterra (Carbon Conscious)
- Carbon Farmers of Australia
- Climate Friendly
- CO2 Australia
- Corporate Carbon
- GreenCollar
- Market Advisory Group
- Select Carbon
- Daryl Killin Management
- Natural Carbon
- Tasman Environmental Markets
- Queensland Government
- Clean Energy Regulator
- Emissions Reduction Assurance Committee
- Department of Environment and Energy (Cth)

All Signatories engaged in individual meetings. Each was asked to outline its role with respect to the schemes covered by the Code and to outline their business model for context. This enabled the

Reviewer to identify the compliance regimes applicable to a Signatory's business which informed the analysis conducted for the Review's Term of Reference 1.2.

All stakeholders were asked to comment on their main concerns or their 'biggest issues' with the Code, as well as the matters arising from the Terms of Reference.

The Terms of Reference stated that the Reviewer may consult with the relevant stakeholders:

- CMI Corporate Members
- Clean Energy Council
- Indigenous Groups
- Natural Resource Management Groups
- Australian State and Territory Governments (excluding Queensland)
- National Farmers Federation
- Meat and Livestock Australia.

Within that relevant stakeholder group, invitations were extended to and consultations were held with:

- Indigenous Carbon Industry Network
- Comhar Group
- Kimberley Land Council
- Indigenous Sea and Land Corporation
- National Farmers Federation
- Norton Rose Fulbright Australia
- Emissions Reduction Assurance Committee
- Qantas
- Woodside
- BHP
- The South Australian Department of Environment and Water
- The Western Australia Department of Primary Industries and Regional Development Group
- The Aboriginal Economic Development Unit of the Western Australian Department of Primary Industries and Regional Development
- The Victorian Department of Environment, Land, Water & Planning
- Clean Energy Council
- The Australian Securities and Investments Commission
- GreenFleet

For various reasons including the bushfires in South East Australia over summer 2019-2020, a number of invited stakeholders were unable to participate in a consultation before the consultation period ended.

The Reviewer thanks all Signatories and stakeholders for their contributions, particularly those stakeholders who responded to the bushfire crisis in south-eastern Australia which understandably took priority.

4.5 Approach to this review

According to the Australian Competition and Consumer Commission (ACCC), well-drafted voluntary codes of conduct potentially increase consumer protection and reduce the regulatory burden on businesses.[3] Voluntary codes encourage conduct consistent with the self-regulatory aims of an industry without the need for external regulation from laws, administrative rules or conflict-activated judicial norms.

In addition, voluntary codes reveal the competencies, processes and conduct that are otherwise unknown to stakeholders. Project developer transparency is a core principle in the Code and is given effect via Section 2.5(5) of the Code which requires Signatories to evidence their compliance measures to the satisfaction of the Code Administrator.

Taking those factors into account, the Review has been guided by the following principles and questions:

- Efficiency – does the Code achieve its desired outcomes with the resources available to it?
- Effectiveness – has the Code achieved its objectives with minimal adverse consequences?
- Clarity and comprehensibility – are the objects and consequences of the Code readily understood by its stakeholders?
- Predictability and consistency – is the Code stable enough to rely upon? Does it avoid confusion? Does it engender trust?
- Proportionality – is the Code's intervention in a Signatory's business the right amount to achieve the Code's objectives? Has it avoided regulatory overreach?
- Flexibility – is the frequency of review suitable given developments underway in carbon markets?

[3] https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf

Section 1.6(4)(d) of the Code requires that the results of the Review must be published online and Signatories to the Code may vote on recommendations which may be made by the Reviewer. Section 1.6(5) of the Code states that Commencement of the Operational Stage will only take place following consideration and, where applicable, implementation of the recommendations of the Review.

5 Chapter 2 – The Code

5.1 Meeting the Code's objectives

Term of Reference 1.1: Provide advice on the extent to which the Code text and requirements in Section 2 of the Code currently meet the objectives of Section 1.1 of the Code, to:

(1) Define industry best practice for project developers, agents, aggregators and advisers in Australia's carbon project industry
(2) Promote consumer protection and appropriate and open interaction with project owners and landowners
(3) Provide guidance to scheme participants
(4) Promote market integrity, accountability and display international leadership in carbon project development.

5.1.1 Defining industry best practice for project developers, agents, aggregators and advisers

Feedback about best practice was mixed with some stakeholders confirming that the Code met the best practice objective, some considered it was 'good', or 'had room for improvement', or that the need for 'continuous improvement' was to be expected. Several stakeholders observed that there was a trade-off between setting very high standards (i.e. best practice) and maximising the number of Signatories to the Code.

A fair number of stakeholders did not agree that best-practice had been achieved in relation to project consent. Consent was described as 'challenging' and was the most significant issue discussed in relation to the achievement of best practice. Please see the next section.

Feedback also suggested that the Code primarily addresses ERF vegetation and savanna burning projects and that the Code should be reviewed for its fitness-for-purpose given the changes underway in the market with the entry of expert corporate project development teams and institutional buyers.

Concern was expressed that the Code should aim to have broader reach and interaction with other industries such as waste, air-conditioning and agribusiness. The Reviewer notes however that section 1.4 of the Code accommodates more than just land-based projects and allows for the application of the Code as appropriate to projects including landfill gas or energy efficiency. Whilst the Code is designed for multiple industries, the CMI may want to recap that it applies to more than land-based projects.

5.1.2 Promote consumer protection and open and appropriate interaction with project owners and landowners

Consultation with stakeholders focused on two points. Firstly, understanding who the 'consumer' is and secondly, on eligible interest holder (EIH) consent as it relates to open and appropriate interaction with project owners and landowners.

Consumer protection

The Code does not define who the 'consumer' is.

When asked, stakeholders uniformly agreed that the 'consumer' needing protection was the rural landholder and the Native title holder. On the other hand, several stakeholders regarded the relationship between the proponent and the owner of the project site to be B2B (business to business) rather than B2C (business to consumer).

The need for consumer protection was recently highlighted by the Fullcam issue – there is a need to ensure landholders and proponents re-assess and factor regulatory risks into their plans and expectations.

Clarifying who is defined to be a 'consumer' is timely as Australian Carbon Credit Units (ACCUs) are being purchased from Signatories on the secondary market, independent of the CER auction process. In addition, the voluntary carbon market has a wide range of consumers transacting a broad array of carbon offsets. Not all types of carbon offsets are regulated by the Australian Securities and Investments Commission (ASIC) and the CER, heightening the Code's consumer protection role.

Consumer protection is discussed elsewhere in the report.

1. It is recommended that the Code clearly define 'consumers'.

Consent

As noted above, EIH consent was one of the material issues that arose in discussions about best-practice standards in carbon project development.

The industry's reputation has been subject to criticism when land use has been perceived to be 'locked' up by the ERF project registration process. Reputational and social capital is also affected by the industry's handling of eligible interest holder (EIH) consent. In theory, sequestration and emissions avoidance projects can be registered for up to four and seven years[4] respectively[5]. One key stakeholder, a carbon project developer, likened the project registration process to a 'veto right' over land use.

The Code refers to the "best practices set out in native title, legal right and eligible holder consent guidance'" published by the Clean Energy Regulator (CER) in June 2018 (Section 2.2(3)(d)). The guidance articulates "best-practice: eligible interest holder consent" and "best-practice: free, prior and informed consent" (page 16). It states that "eligible interest-holders determine whether they are willing to provide consent. Any proponents found to be placing undue pressure on eligible interest-holders may put at risk their fit and proper person (FPP) status and find themselves subject to other legal action." In short, the CER has the means to remove a proponent from the scheme for improper dealings with eligible-interest holders. The Review notes that revoking FPP status can have unintended adverse implications for landholders – it could make a proponent insolvent which would leave all of a proponent's landholders in the lurch.

Consistent with the CER's guidance, the Code sets out a process for Signatories to follow including notification of intent to register, to enter into genuine and early engagement with native title holders, to take reasonable steps to comply with UNDRIP[6] principles including the principle of free, prior and informed consent (FPIC), and to take reasonable efforts to enter into binding agreements with Native Title holders prior to project registration (Section 2.3(3)(d)).

The Review asked stakeholders whether the Code sets out best-practice for obtaining EIH consent. There was a range of different views amongst stakeholders with several explaining that whilst genuine effort was made to obtain consent prior to project registration, it was not always achievable. The alternative view was also expressed with equivalent high conviction.

The Indigenous Carbon Industry Network (ICIN) has recently issued its guidance on "Free, Prior and Informed Consent". ICIN's guidance is positioned as best-practice and requires project developers to

[4] Comprising an 18-month delayed start date, a two to five-year reporting period and a 6-month reporting deadline.

[5] The Reviewer was advised however that projects are usually revoked in practice earlier than the four or seven-year mark.

[6] United Nations Declaration on the Rights of Indigenous People.

obtain consent before they apply to register a carbon project[7]. As well as being consistent with UNDRIP, ICIN reasons:

> *"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."*

The National Farmers Federation (NFF) has issued its 'Industry Engagement Guidelines for On-Farm Activities', which articulates principles for respectful and constructive engagement between farmers and industries that require access to land. The principles include the expected modes of communication, the form of land-use agreements, benefits sharing, stewardship and community engagement.

5.1.2.1 Recommendations

2. It is recommended that the Code clarify in section 2.3(3)(d) that best-practice requires EIH consent to be obtained prior to the registration of area-based ERF projects, consistent with the guidance of Indigenous Carbon Industry Network (ICIN) for "seeking free, prior and informed consent from indigenous communities for carbon projects" – a best practice guide for carbon project developers.
3. The Review recommends the above best-practice standard on an 'if not, why not' basis. It is recommended that Signatories be obliged to report against the best-practice standard on the 'if not, why not' basis in their 'Annual Report (Self-Audit Checklist)'. The 'if not, why not' approach requires a Signatory to report the reasons why they did not achieve the Code's best-practice standard. The Signatory should report the strategy adopted to obtain consents from EIHs and the reasons why consent could not be obtained prior to project registration. The Code Administrator could then assess whether the Signatory's approach was credible and consistent with the Code's 'open and appropriate interaction' objective and the community trust

[7] https://www.savannafireforum.net/copy-of-key-resources , https://a62efcec-3d67-4043-80a5-4dbbe9fe53f1.usrfiles.com/ugd/a62efc_4025ec9b11524ab2ae415882e1f92bbf.pdf page 16.

principle. In addition, it would provide demand-side participants with a cue for a meaningful dialogue about EIH consent.

A stakeholder proposed that the Review consider the concept of 'active dissent' applied to EIH consent. 'Active dissent' would recognise a pre-project decision made by an EIH to never provide consent for the project to the ERF proponent. Recognition of active dissent would save both proponent and the EIH the time and money invested in a project that would not generate ACCUs. In this scenario, it may mean a Signatory doesn't register a project or voluntarily de-registers a project.

4. It is recommended that Signatories consider the financial and cultural advantages of taking into account the 'active dissent' of EIHs in relation to area-based ERF projects.

5.1.3 Provide guidance to scheme participants.

Further guidance on co-benefits

At the time that the Code was developed, the discussion regarding co-benefits from projects was still in its infancy. However, a number of states and territories having put in place, in one form or another, co-benefit-type schemes. These include, among others, the NSW biodiversity schemes and the Queensland Land Restoration Fund (QLRF). International schemes such as the Gold Standard for the Global Goals also require projects to deliver additional benefits to carbon abatement. Consistent feedback received through the consultation process was that the momentum in this space warrants that further guidance be provided in the Code to regulate fair and transparent benefit-sharing arrangements between clients (the originators of the co-benefit) and signatories for projects that generate co-benefits.

Communicating with clients

According to stakeholders, clients range from sophisticated carbon market players to vulnerable landholders and indigenous groups. Whilst the Code requires the written agreement with the client to be in 'plain English', English is not the first language of all clients. The client base is a culturally and linguistically diverse group (CALD) which needs to be recognised and supported. The Reviewer has been advised that translators should be involved when literacy and numeracy skills warrant it. In addition, we note that communication with stakeholders should not be limited to documents – in some cases, the most effective medium for informing landholders about carbon projects may be video.

Further guidance on Australian Financial Services Licenses

Key feedback from Signatories of the Code was to provide further clarity regarding when an Australian Financial Services license (AFSL) would be required. A number of Signatories suggested that in their experience, they had encountered landholders receiving what could be construed as financial advice from signatories who do not have an AFSL. The Review notes that ASIC provides guidance on whether an AFS licence is required to participate in carbon markets[8].

Options for selling carbon credits

Signatories also noted that further guidance could be provided on Section 2.2(10)(a) of the Code: 'Signatories must inform clients of the relevant options available for the sale of carbon credits.' This could be done either through the Code text or via a supplementary document.

Definitions

Relevant stakeholders asked that the Code include definitions (with explanations) of the different types of Signatories:

- carbon service providers,
- agents,
- aggregators, and
- project developers.

Simplification of the Code

The Code could be simplified to ensure that each of the items in Section 2 of the Code is clearly linked to achieving the objectives listed in items in Section 1.1 and 1.3. Any further materials could be included as Appendices or added to the supplementary document 'Guidance for signatories – becoming a signatory'. This would make the Code easily readable and highlight the most important aspects of the Code.

Further advice in relation to guidance is addressed in Chapter 3.

[8] https://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-236-do-i-need-an-afs-licence-to-participate-in-carbon-markets/

5.1.3.1 Recommendations

5. It is recommended that the Code provide guidance aimed at ensuring fair and transparent benefit-sharing arrangements between clients (the originators of the co-benefit) and Signatories for projects generating co-benefits.
6. It is recommended that the Code modify the requirement to provide the information outlined in section 2 in 'plain English', and instead require that a Signatory use the medium of communication that is linguistically and culturally appropriate for the audience and their level of maturity in the carbon market.
7. It is recommended that the Code Administrator assist Signatories and stakeholders in accessing ASIC's guidance on the need for an AFSL.
8. It is recommended that the Code Administrator provide guidance on the options for selling carbon credits.
9. It is recommended that the Code define the different types of Signatories.
10. It is recommended that supplementary materials linking Section 2 to the objectives in sections 1.1 and 1.3 be provided.

5.1.4 Promote market integrity, accountability and display international leadership in carbon project development

Market integrity

The Review noted that there was not a shared understanding of 'market integrity' amongst Signatories or relevant stakeholders. Definitions of market integrity typically include these market features:

- capital can be raised on a sustainable basis;
- transparent and accurate information about prices is available to all participants at the same time;
- accurate information about issuers of securities is available to all participants at the same time
- non-discriminatory access is provided to those wishing to participate;
- participants in the markets are treated as equals;
- there are no abuse activities in the market where for example a participant could take advantage of their position to gain an unmerited advantage over another, for example, by market manipulation;
- investors have confidence in it;
- participants demonstrate honest and responsible conduct; and
- effective rules are in place that are enforced by regulators so that confidence and participation in the market is continually fostered.

5.1.4.1 Recommendation

11. It is recommended that the Code define its version of 'market integrity'.

5.1.5 Written Agreements

The Review notes the importance of the written agreement with the client. The Code requires a written agreement to be in place (Section 2.5(1)), and that the failure to do so constitutes a major breach (Section 3.6(1)). Failure to rectify a major breach results in the publication of the breach and the Signatory's name on the Code website and in the Annual Report.

Contracts between Signatories and clients may have terms as long as 25 years, in line with long-term crediting periods of certain ERF projects.

The Review notes the extensive disclosures and technical advice a Signatory must provide a prospective client. However, other than making an agreement mandatory, the Code does not otherwise provide guidance on or regulate the contents of agreements. As a result, a reconciliation of Code objectives[9] would not be able to be performed against the terms in a standard or model agreement. Nor would a reconciliation be able to be performed against an actual agreement due to the confidential nature of the bilateral agreements between Signatories and their clients, and the proprietary legal knowledge invested in the agreements.

Typically, commodity and services contracts address issues such as:

- review and termination
- agreed services and rates
- price/volume/tolerances
- timelines and reporting
- sharing of benefits and risks
- fees
- insurances
- dispute resolution
- failure to perform
- payment terms
- indemnities
- force majeure events
- default
- jurisdiction.

The Review notes that government guidance on ERF aggregation contracts is available online.[10] However, not all clients contract with aggregators.

The majority of stakeholder feedback was in favour of the Code providing contract guidance in the form of a model contract and/or model contract provisions. Reasons for a model agreement include:

- The need to ensure that agreements reflect the Code's principles and objectives;
- It would assist the smaller Signatories commercially;
- There is a need for contracts to clarify the marketing of co-benefits;

[9] such as best-practice, consumer protection, guidance to scheme participants, and the promotion of market integrity, accountability and international leadership.

[10] http://www.environment.gov.au/climate-change/government/emissions-reduction-fund/aggregation-agreement and at https://environment.gov.au/system/files/pages/08abd328-40b3-4538-9000-5a3e64cbe041/files/aggregation-agreement-factsheet.pdf .

- There is a need for co-benefit originators to authorise subsequent sales of co-benefits to third parties;
- It is unclear whether agreements with clients use reference rates or prevailing market prices or whether contract prices are linked to projects on the client's property;
- It is unclear whether clients have the right to renegotiate when major regulatory changes come in; and
- It is unclear whether a client agreement mirrors the benefits that grandfathered reforms may provide a proponent Signatory.

5.1.5.1 Recommendation

12. It is recommended that the Code Administrator provide legal guidance for written agreements via model contracts for each of the various types of arrangements entered into by Signatories and clients.

5.1.6 Vision

Section 1.2 of the Code sets out the shared vision to achieve a well-functioning emissions reduction and carbon sequestration industry (hereafter referred to as the carbon industry) in Australia at the scale required to significantly contribute to Australia's greenhouse gas reduction commitments under the Paris Agreement. It was suggested in consultation that the Code Administrator should test the vision given the changes in the market since its commencement.

5.1.6.1 Recommendation

13. It is recommended that the Code Administrator review the Code's vision of 'significantly contributing to Australia's greenhouse gas commitments under the Paris agreement'.

5.2 Achieving the Code's objectives, principles and outcomes during its Operational Stage

Terms of Reference 1.2: Provide advice and recommendations on the extent to which Section 2 of the Code could be amended for the Operational Stage to better ensure the achievement of Section 1.1 of the Code and the outcomes and underlying principles in Section 1.3 of the Code, taking into consideration:

> *1.2.1 The economic and administrative burden for Signatories of the Code to effectively comply with the requirements of an amended Code.*
>
> *1.2.2 Changes by relevant regulatory or administrative agencies (e.g. the Clean Energy Regulator, ASIC, Department of Energy and Environment) to improve (streamline and make more efficient) and update regulation of the market, that may interact with, or duplicate Signatory compliance and Code administration activities.*

The Review proactively considered ways to 'congestion bust'.

Based on the Signatories' business models, it was noted that other compliance responsibilities arise from ERF and AFSL obligations and, for some Signatories, commitments made to the QLRF. Those broader compliance responsibilities were taken into account when reviewing and considering recommendations to amend the Code.

A high-level assessment was done to pinpoint areas where operational-stage Code, ERF and AFSL compliance obligations would overlap and add to the administrative effort. In the interests of administrative efficiency, the Review assessed the merit of the Code Administrator in relying on the relevant compliance monitoring programs of ASIC and the CER in those overlapping areas during the Code's Operational Stage. An analysis of the issues follows.

5.2.1 Code interaction with the financial services regime (ASIC)

Section 2.4(2) of the Code requires Signatories to assess whether they require an Australian financial services licence (AFSL). The majority of foundation Signatories have AFSLs or have been appointed as authorised representatives of licensees.[11] Refer to Appendix 1 for more information about AFSLs.

[11] Confirmed by reviewing the AFSL professional register at ASIC https://connectonline.asic.gov.au/HLP/SearchRegisters/sch-using-this-service/sch-whatyoucansearch/professional-registers/index.htm 3 March 2020

The extent to which a licensee Signatory's economic and administrative burden is added to by the Code is informed by its own business model, its AFSL authorisations and any efficiencies derived from the common compliance measures it has implemented. Factors such as customer type – retail or wholesale – are influential in the design and implementation of a licensee's compliance measures.

It is noted that the AFSL regime does not extend to all types of carbon offsets. Only those carbon offsets that fall within ASIC's definition of "regulated emissions units"[12] are considered financial products.

The Code's protective measures overlap in many ways with the financial services regime's consumer protection measures. These include dispute resolution, conflicts of interest, standard setting, resource adequacy and minimum competencies. These are briefly outlined below.

5.2.1.1 Retail consumer protection

Licensees must comply with financial services laws, an example of which are the consumer protection provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). The consumer protection provisions prohibit a person from engaging in misleading or deceptive conduct and prohibit unconscionable conduct. In addition, under the ASIC Act, a term in a consumer contract may be rendered void if it is deemed to be unfair.[13]

Categorisation of wholesale and retail customers is closely linked to the Code's objective of consumer protection. The law provides more protection for retail customers. ASIC's Regulatory Guide 236 notes that the financial services regime recognises both wholesale and retail clients[14] and states that "some requirements of the financial services regime only apply to retail clients because it is recognised *that wholesale clients are in a better position to look after their own interests*".[15]

A signatory's business model and/or its AFSL authorisations might mean it provides carbon project development services to wholesale or sophisticated investors only. The Review notes recent press articles criticising the twenty year old financial tests set in the *Corporations Act* – they are not necessarily reliable indicators of a client's financial literacy.[16]

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[12] https://www.asic.gov.au/regulatory-resources/financial-services/carbon-markets/regulated-emissions-units-applying-for-or-varying-an-afs-licence/#what-are-units

[13] ASIC RG 236 page 53.

[14] ASIC RG236 page 17.

[15] ASIC RG 236 page 18.

[16] Australian Financial Review, Misclassifying sophisticated investors 'widespread'. 2 March 2020.

When the Code's obligations to protect consumers replicates a licensee Signatory's legal obligations and duplicates compliance reporting and auditing, then the Code adds to a licensee Signatory's administrative burden. This will be the case even when the law and the Code are largely harmonised.

5.2.1.2 Audit, standard setting, resources, competencies and handling of conflicts

A core legal obligation of an AFS licensee is to operate its business efficiently, honestly and fairly. Those values complement the principles and objectives of the Code. An AFS licensee's obligations mirror many of the standards set by the Code and harmonise with the Code Administrator's compliance program, for example:

- AFS licensees are subject to annual, independent audits of financial statements and compliance with its licence conditions.
- A licensee must ensure it has adequate financial, human and technical resources and adequate risk management systems.
- Business competency must be underpinned by adequate staff training.
- If a licensee provides advice on ACCUs or other financial products to 'retail' clients, it must comply with the training requirements set out in ASIC's Regulatory Guide 146.
- Conflicts of interest must be handled in line with ASIC's Regulatory Guide 181.

5.2.1.3 Dispute resolution

The Australian Financial Complaints Authority (AFCA), an independent dispute resolution body,[17] commenced in November 2018, five months *after* the Code was implemented.[18]

AFS licensees must have both internal and external dispute resolution measures for handling complaints from retail customers. Membership of AFCA is required under financial services licence conditions in accordance with ASIC's Regulatory Guide RG 165. The AFCA website can be used to find which Signatories are members.[19]

AFCA considers complaints about investments and financial advice from *retail and small business* customers and its decisions can be binding on the licensee involved in the complaint. It can award compensation for losses suffered because of a licensee's error or inappropriate conduct, however it

[17] https://www.afca.org.au/about-afca/

[18] https://afca.org.au/news/media-releases/afca-consults-on-draft-rules-to-enhance-dispute-resolution/

[19] Find a member, https://www.afca.org.au/make-a-complaint/findafinancialfirm/

does not award compensation or impose fines. Refer to Appendix 1 for more information about AFCA.

5.2.1.4 Discussion

The variety of Signatory business models in combination with their unique AFSL authorisations and particular client types does not support a uniform carve out from Code obligations in Section 2 or compliance reporting (Section 3) for licensee Signatories.

For some licensed Signatories, there may be substantial overlaps from Section 2 obligations and AFSL-related business practices and compliance measures.

The Review reiterates that financial services laws are designed to be protective of retail consumers, providing them with accessible institutional support for complaints and disputes resolution.

The Code Administrator is encouraged to take a pragmatic but prudent approach and recognise the extent of a Signatory's overlapping business practices and compatible AFSL compliance measures. Demonstration of the relevance and effectiveness of those practices and compliance measures by the Signatory could then allow the Code Administrator to focus on the Signatory's residual Code obligations and reports.

5.2.1.5 Recommendations

14. It is recommended that the Code Administrator be given the discretion to recognise and rely on the business practices and compliance measures a Signatory has implemented to meet its AFSL obligations, subject to the Signatory demonstrating:
    - the applicability of its AFSL to its carbon project customers;
    - the duplication of its AFSL and Section 2 obligations and monitoring;
    - the quality of its business practices; and
    - the effectiveness of its compliance measures.

Whilst this recommendation pertains to Section 2 of the Code, it can be effected via an amendment to Section 3.4.

15. When applicable, it is recommended that the Code Administrator and Signatory review the above arrangement annually, or in the event the signatory ceases to be licensed, whichever is the earliest. This requires an amendment to section 3.4.
16. It is recommended that the Code Administrator develop the capabilities necessary to support its discretionary role in determining the relevance and effectiveness of Signatory's AFSL compliance measures.
17. It is recommended that AFCA be added to the list of Consumer Protection Organisations in section 5.1 of Appendix 1 of the Code. In addition, the CMI and the Code Administrator should consider promoting AFCA's complaints and dispute resolution role for retail consumers on the Code of Conduct website.

5.2.2 Wholesale customers - AFMA Code of Conduct

Section 2.4(2)(d) of the Code states "in dealing with and providing advice regarding ACCUs, Signatories will have regard to the Australian Financial Markets Association (AFMA) Code of Conduct".[20]

As noted above, 'retail' clients are afforded protections under financial services laws whereas wholesale participants are considered able enough to look after their own interests. For Signatories who deal with wholesale customers, the AFMA Code provides a framework for making decisions in the less regulated 'grey' areas, where there is no clearly articulated rule or legal requirement or where interpretation of principles-based law or rules is necessary.[21]

Section 3 of the AFMA Code is the relevant section for Signatories for guidance on dealing and advising wholesale customers. By setting a very high standard of conduct, Section 3 of the AFMA Code may become more relevant to Signatories and their wholesale clients as the secondary market in ACCUs develops. AFMA's guidance on transacting at out-of-market rates for example, may become more relevant if ERF auction-based fixed ACCU prices cease to be the relevant price or reference rate in customer contracts.

[20] https://afma.com.au/afmawr/_assets/main/LIB90010/Code%20of%20Conduct%20-%20GUIDELINES.pdf

[21] https://afma.com.au/code-of-conduct

5.2.2.1 Recommendation

18. It is recommended that Section 2.4(2)(d) of the Code specifically refer to 'Section 3' of the AFMA Code to clarify that it provides guidance on dealings with and advice to wholesale customers.

5.2.3 Code interaction with the CFI Act

The Clean Energy Regulator administers the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act), which underpins the Emissions Reduction Fund (ERF). The CFI Act outlines requirements that must be met for a person to participate in ERF, usually referred to as the Fit and Proper Person (FPP) requirements. The FPP requirements as relevant to the project proponent are stringently assessed before a project is registered. The project proponent must maintain their FPP status throughout their participation in the scheme.

As part of the FPP assessment, the Clean Energy Regulator usually considers a person's past compliance with the law, whether they are insolvent, and whether they have the necessary capabilities and skills to undertake the project activities. A person must maintain their FPP status in order to be issued ACCUs.

The CFI Act prescribes the relevant stakeholders that must provide consent to the project activities before the project can be unconditionally registered. This depends on the nature of the land title and project type and may include consent from financial institutions, the Crown lands Minister of the State or Territory or registered native title body corporate.

The CFI Act also requires participants to submit regular reports which detail their project activities, and these are known as offsets reports. Project reports can cover a maximum period of two years for emissions avoidance projects, and five years for sequestration projects. The CFI Act allows a project proponent to apply for ACCUs for a project after a reporting period. However, no ACCUs can be issued until all conditions from the project have been removed and the project is unconditionally registered.

The project is also required to be audited by a category 2 auditor registered under the *National Greenhouse and Energy Reporting Regulations 2008*. At least three audits are required through the life of a project, though this can be as high as six depending on the total project abatement. The audit

reports provide a level of assurance that the project activities are being carried out in line with the requirements of the CFI Act, CFI Rule and relevant methodology determination.

5.2.3.1 Recommendations

19. It is recommended that Section 2.3 clarify that where the Signatory is an ERF proponent for a project, the overlapping Code obligations of Section 2.3(3) and (4) are not applicable in relation to the particular project/s. Signatories who are project proponents in the ERF are already required to comply with the offset reporting, audit and record-keeping requirements under the Carbon Farming Initiative (CFI) Act. Duplication of these obligations for Signatories acting as ERF proponents for some or all projects is not necessary.
20. It is recommended that the Code Administrator focus its compliance monitoring activities on any residual Code requirements that are not already covered by the CFI Act and subordinate legislation in order to reduce administrative burden for both the Code Administrator and the relevant Signatory.
21. It is recommended that the Code Administrator refer to the ERF project and contracts registers published on the Clean Energy Regulator's website where possible to minimise administrative burden on clients. The Code Administrator should request the Clean Energy Regulator consider making available project data to facilitate the automation of Signatory Annual Reports to the Code Administrator.

5.2.4 Code interaction with the Queensland Land Restoration Fund

Each applicant submitting an investment application for a QLRF project investment agreement must be Code Signatory or if they are not a Signatory, the applicant must engage Carbon Service Providers that are Code Signatories.

A number of compliance obligations and contractual commitments arise for Signatories involved with the QLRF.

The Code is silent on the financial viability of a Signatory, however, a Signatory applying for a QLRF Project Investment Agreement will have its initial financial viability and its 'financial capability to deliver the project' assessed.

The Review has recommended that guidance in the form of model contract provisions or model contracts be developed. The QLRF's agreement serves as a reference for content in ACCU purchasing agreements. The QLRF agreement reveals conditions precedent and key provisions, for example, unconditional project registration, insurance types and coverage levels (professional indemnity and public liability) as well as payment terms.

The entry of states and territories, entities under the Safeguard Mechanism, and voluntary participants into the market extends the ACCU supply chain. Signatory sellers of ACCUs will increasingly need to address eligibility and conformance with demand-side procurement policies and community standards. Feedback was received from corporate stakeholders about the importance of having principled procurement policies, one example being the policy of a major corporate (demand-side) which imposes standard payment terms of 30 days maximum for small businesses.

Government agencies similarly regulate their supply chain. Sellers of ACCUs to the QLRF are referred to Queensland government procurement policies which outline many factors including value for money, supplier WHS compliance and ethical supply practices.[22] The QLRF will pay ACCU suppliers within 10 days of delivery.

Section 2.5(2)(b) of the Code states that Signatories should recommend to the client that it obtain independent legal and/or financial advice. During consultations, Signatories shared the concern that there are few advisers with the required expertise in carbon projects to advise their customers.

The QLRF[23] in conjunction with the Queensland Rural and Industry Development Authority (QRIDA) have recently addressed this concern with an adviser capacity building, accreditation and funding program, which details:

1. QRIDA is approving solicitors, accountants, project developers, environmental consultants and agribusiness consultants and providing them with training on carbon farming and the QLRF. To be approved, an adviser must complete training at the Land Restoration Fund Knowledge Centre, evidence their expertise and be adequately insured.[24]

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[22] https://www.qld.gov.au/__data/assets/pdf_file/0022/116545/LRF-investment-application-guidelines.pdf page 22,23

[23] https://www.qld.gov.au/environment/climate/climate-change/land-restoration-fund/2020-investment-round/advisers

[24] http://www.qrida.qld.gov.au/current-programs/CFARP-approved-advisers

2. The Carbon Farming Advice Rebate Program will provide landholders involved in carbon farming with a rebate of up to $10,000 to offset the cost of obtaining their own independent advice about QLRF projects on their land.

It is expected that these initiatives will enhance the market's demand-side efficiency by facilitating carbon farming opportunities. In addition, strengthening adviser capabilities reinforces the Code's objective of consumer protection.

5.2.4.1 Recommendations

22. It is recommended that the development of model contract provisions and/or model agreements for ACCUs be informed by the legal standards and procurement policies of its government and major corporate stakeholders.
23. It is recommended that the CMI continue positioning Signatories as trusted, ethical suppliers in the ACCU supply chain.
24. It is recommended that the Code of Conduct webpage/s link to the relevant QLRF and QRIDA webpages to facilitate the uptake of independent advice and to promote consumer protection.

5.3 Reforms underway and their impact on Signatory compliance with the Code

5.3.1 Environmental integrity / ERF project proponent succession

The Department of Agriculture, Water and the Environment has consulted on a proposal to allow more flexibility for changing project proponents under the Emissions Reduction Fund.[25]

The proposed reform links continuity of abatement with orderly proponent succession.

The change would be effected by amending the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (Cth). The proposal addresses the current situation where an ERF project is revoked if a project proponent walks away from a project without transferring it to another eligible proponent. A proponent may cease to be a fit and proper person or becomes insolvent and the reform would facilitate a willing and able proponent, including the landholder, to step in as the proponent so that a project can continue.

A successful rule change will ensure that the crediting of abatement from registered projects in the ERF continues over the long term, regardless of who the project proponent is. It is also consistent with the Code's principle of ensuring the environmental and social integrity of the Scheme (Section 2.1(1)(b)).

During our consultations, we have been informed that Signatories have entered long term agreements with landholders for sequestration projects where the term of the agreement matches the length of the project's crediting period. It is highly likely that there will be changes to the principals and/or the ownership of a Signatory's business over the ten to twenty-five-year lifespan of such agreements.

Whilst there may be provisions addressing proponent succession in written agreements between Signatories and landholders, those contracts are private and commercial. The Code provides no guidance on Signatory succession planning or contingencies. Nor have model contract provisions addressing succession been developed yet.

It is noted that the Application process for a Project Investment Agreement with the QLRF requires the Applicant (a Code Signatory) to demonstrate their eligibility, one requirement being:

> "*The Applicant and/or the contracted entity must not be, or become, bankrupt, insolvent, or be in, or enter into, administration, receivership or liquidation, or take advantage of any*

[25] https://www.environment.gov.au/climate-change/government/emissions-reduction-fund/consultation/rule-change-consultation

statute for the relief of insolvent debtors at any time during the investment process."[26]

The implication of this eligibility criterion is that Signatories with QLRF Project Investment Agreements must, on an ongoing basis, ensure they maintain their financial viability during the QLRF investment process.

5.3.1.1 Recommendations

25. It is recommended that Section 2.5(1)(a) of the Code be amended to add: "If the Signatory takes on the role of ERF project proponent, the written agreement between the Signatory and customer must provide for orderly succession of the project proponent, consistent with the environmental and social integrity of the Scheme and with the relevant laws."

[26] https://www.qld.gov.au/__data/assets/pdf_file/0022/116545/QLRF-investment-application-guidelines.pdf page 34.

6 Chapter 3 Administration of The Code

Term of reference 2.1: Review and make recommendations for the governance and operational procedures required to administer Sections 3.2, 3.3(1), 3.4(2), 3.5, 3.7, 3.8, 3.9, 3.10(4), 3.10(5) of the Code, which will become operative during the Operational Stage of the Code.

Term of reference 2.2: Review and make recommendations to improve current governance and operational procedures that have been utilised by the Code Administrator to administer all operative sections of Section 3 and Section 4 of the Code during the Foundation Stage.

6.1 Role of the Review Panel

For recommendations on Section 3.2 of the Code, please refer to sections 7.6.2 and 7.6.5 of the Review.

6.2 Disputes

The Review found there were no reasons to amend Section 3.3(1).

6.3 Compliance and auditing

The Review found no reasons to amend Section 3.4(2). Recommendations in relation to information security are made later in this report.

6.4 Investigating and determining breaches

The Code addresses a Signatory's own breaches and also allows for a Signatory to report breaches made by other signatories.

6.4.1 Timeliness of breach reporting

Under section 2.5(6)(a), a Signatory is required to provide an annual confirmation of their compliance with the Code. Under section 3.5(1)(a) breaches will be investigated by the Code Administrator that have been raised via self-reporting from Signatories.

The first section indicates that breaches will be reported at least annually. The last section implies that a breach *might* be self-reported during a course of the year. Industry best-practice suggests that

disclosure of material non-compliance should be done in a timely manner.[27] Signatories with AFSLs are already required to report significant breaches as soon as practicable, and in any event within ten business days of becoming aware of the breach or likely breach.[28]

Under Section 2.5(6)(e), a Signatory *must undertake* to inform the Code Administrator of a major or severe breach made by other Signatories. Under Section 2.5(6)(f), Signatories *should endeavour* to inform the Code Administrator of any Code breaches made by other Signatories. Upon the Code Administrator's request, a Signatory must provide information and data about a suspected breach (section 2.5(6)(g)(ii)). As noted above, other than the annual Code compliance confirmation, the Code is not precise on the timing of breach reporting.

The Code's objective of industry best-practice is increasingly relied upon by regulators of statutory schemes.

6.4.1.1 Recommendations

26. It is recommended that the Code Administrator provide guidance to Signatories on best-practice standards for timely self-reporting reporting of material breaches.
27. It is recommended that Signatories be provided with the opportunity to provide feedback on whether the Code should be amended so that it clarifies the timing for self-reporting of major and severe breaches.
28. It is recommended that the Code Administrator set expectations on the timing of Signatory breach reporting. In principle, a Signatory should be the first to report on its own breaches to the Code Administrator (as opposed to hearing about it from other Signatories or the media).

[27] AS ISO 19600:2015 Compliance management systems – guidelines, pages 8,9,23. The ACCC's Guidelines for effective voluntary codes of conduct refers to AS3806 (2006) the predecessor standard, page 11, for in-house compliance systems.

[28] https://www.asic.gov.au/regulatory-resources/financial-services/breach-reporting-by-afs-licensees/

6.4.2 Professionalism

The voluntary provision of information of possible breaches of the Code from an independent Signatory may protect a consumer or another stakeholder from an improper or abusive practice. Enforcement of the Code will benefit when breach reporting is conducted responsibly. Some stakeholders expressed the view that breach reporting on other Signatories must be done for the proper purpose of maintaining the Code's integrity and reputation. Amongst the Signatories, there was no tolerance for erroneous breach reporting. Section 2.6(5) of the Code prohibits Signatories from making vexatious or unfounded claims against another Signatory. However, the Code does not provide the Signatories with *positive guidance* on how to conduct themselves when reporting breaches on another.

6.4.2.1 Recommendation

29. It is recommended that Section 2.6 of the Code be amended to include positive guidance on Signatories' professional relationships with each other, emphasising that their conduct as a group must support the Code's integrity and reputation, and that Code Signatories be seen as a principled group that acts ethically and with integrity.

6.5 Sanctions

Effective deterrence requires the sanction to address the type of breach *and* the reasons why it occurred. When sanctioning Signatories, the Code Administrator and the Code Review Panel must strike the right balance between leniency and severity so that Signatories remain motivated to continuously comply with the Code and to self-report Code breaches.

The consensus view from Signatories was that the sanctions matrix in Section 3.7 was appropriate.

Please refer to Section 7.6.2 for recommendations on sanctions.

6.6 Suspensions and removals

Please refer to Section 7.6.2 for recommendations on suspensions.

6.7 Appeals and Triennial Reviews

The Review found no reasons to change Sections 3.9, 3.10(4) or 3.10(5).

6.8 Code Administration at the Operational Stage

2.2.1. Provide advice and recommendations on the extent to which Section 3 and Section 4 of the Code could be amended for the Operational Stage to improve the administration of the Code.

The Review refers to the recommendations in Section 5.2.

6.8.1 Guidance and Training Materials

Term of reference 2.3 Recommend guidance and/or training material and events covering Code Signatory Obligations set out in Section 2 of the Code, to be prepared, published and/or delivered by the Code Administrator for the Operational Stage, providing Code Signatories with a better understanding of their obligations and the detail necessary to effectively comply with the Code.

Guidance

In addition to section 2 which sets out the rules and standards of the Code, the Code Administrator has also developed supplementary guidance materials. These are published on the CMI website. Materials relevant for Signatories include:

- 'Guidance for Signatories – becoming a Signatory'. This document provides further guidance on how to comply with various sections of the Code, in particular section 2 'General rules and standards'.
- 'Guidance for Signatories – handling complaints'. This document outlines an effective process for handling complaints that would comply with the complaints handling requirements of section 2.5(4) of the Code.
- 'Complaints handling procedure'. This document outlines the Code Administrator's process for handling complaints.

Materials relevant for non-Signatories include:

- 'Guidance for stakeholders – general information'. This document provides guidance on the responsibilities of a signatory and methods for making a complaint.

During the Review, a comprehensive audit was conducted to locate all available guidance materials that would be relevant to Signatories. The audit also considered guidance available on the CER and ASIC websites.
Some areas were identified where the existing guidance could benefit from further elaboration. These include:

- Project feasibility advice – Advice is critical to deciding to undertake a carbon project. A landholder's decision has implications for them for the next 25-100 years. The Code guidance document 'Guidance for Signatories – becoming a Signatory' covers the provision of project feasibility advice, however the guidance provided in the document is minimal. In order to maintain consistency in advice that Signatories are providing their clients, and highlight important considerations, clear guidance should be prepared for Signatories and clients.
- Risk assessment plan – ERF projects carry a number of different types of risks. These include project, regulatory and financial risks. The Code should require participants to draft a risk assessment plan and share this with clients as part of the feasibility assessment.
- Stakeholder consultation requirements – A key outcome of the Code, as mentioned in section 1.3 of the Code, is to achieve 'appropriate consultation with project stakeholders, including native title holders, native title representative bodies, land councils and natural resource management (NRM) bodies.' In order to achieve this, the Code should develop its own guidelines for stakeholder consultation that adhere to best practice. Alternatively, the Code could reference the Gold Standard *Stakeholder Consultation and Engagement requirements* which sets a benchmark by recommending stakeholder consultations be carried out before projects can be started. The Review notes that ICIN provides authoritative guidance for inclusive engagement with Indigenous carbon market participants.

The review also found that the Code Administrator could assist Signatories to comply with the Code by providing supporting materials. Feedback from small- to medium-sized carbon service providers was that the burden of complying with the Code was significant, and suggested that the following materials would assist them to comply with the Code:

- Checklist – The Code requires a signatory to provide substantial information to a client during the pre-project period. To assist in this regard, the Code Administrator could provide Signatories with a one to two page checklist of the information that must be provided to a client. Optionally, this checklist could be witnessed by the client to assist with a Signatory's self-reporting requirement. This checklist could also form part of a standard contract between a Signatory and a client, if relevant.

- Handout for clients – Feedback from Signatories suggests that they are unable to discuss the Code with clients due to its complex nature and dense material. In order to ensure successful marketing of the Code, the Code Administrator should develop a user-friendly handout on the Code which must be provided to all Signatories' clients. The handout could include a summary of the Signatory's obligations and the client's options to raise disputes.

In order to increase transparency and accountability from project developers, and promote the fair treatment of landowners, the Code should also consider publishing information useful for Signatories' clients on a Client Hub or similar on its website.

The Client Hub would also be useful for small- and medium-sized Signatories who do not have the resources to generate their own guidance materials.

As a start, the following information could be displayed:

- Transparency of ACCU prices – Relevant consultancy businesses should be encouraged to to display current ACCU prices on their website. This information allows clients to make informed financial decisions and improves accountability of Signatories.
- Model contract terms – The Code Administrator should prepare standard contract terms and encourage Signatories to include them in every contract with their client.
- Information on business models – The Code Administrator should develop information on the various business models in the carbon market, or alternatively, the CMI could work with Signatories to draft guidance on this matter.
- Links to useful information – The Client Hub could act as the single source of information for clients with useful links to the CER, QLRF and AFCA.

Training and events

Term of reference 2.3: Recommend guidance and/or training material and events covering Code Signatory obligations set out in Section 2 of the Code, to be prepared, published and/or delivered by the Code Administrator for the Operational Stage, providing Code Signatories with a better understanding of their obligations and the detail necessary to effectively comply with the Code

Carbon projects are primarily conducted in remote and regional areas of Australia where landowners' access to legal and professional advice is limited or costly. Consultees suggested that there is a lack of suitably qualified legal professionals, especially in regional areas, who can provide independent legal advice to clients.

Additionally, numerous signatories identified that obtaining consents from financial institutions was a serious obstacle. In addition to the delays caused in obtaining consent, financial institutions do not recognise carbon projects on land as assets, instead considering them liabilities. In order to improve capability in the legal and banking sectors, the CMI should work along with relevant regulatory agencies to conduct outreach activities that raise awareness about the growing carbon market.

The Code should also consider including a continuous professional development (CPD) module for Signatories. It is noted that Signatories with AFSLs have an obligation to ensure they remain competent. Training could include an introduction to the relevant legislation, CMI seminars and readings, webinars hosted by the CER, and online cultural awareness training such as the Core Cultural Learning course offered by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)[29].

6.8.1.1 Recommendations

30. It is recommended that the Code Administrator provide further guidance for signatories on developing feasibility advice, risk assessment plans and conducting stakeholder consultations.
31. It is recommended that the Code Administrator provide checklists and handouts to assist small- to medium-sized carbon service providers in complying with Section 2 of the Code.
32. It is recommended that the Code Administrator publishes information on a Client Hub on its website that could be accessed by clients.
33. It is recommended that the CMI work with both the Commonwealth Government and state governments to increase awareness in the legal and banking sectors of the benefits of carbon projects.

[29] https://aiatsis.gov.au/core/landing .

7 Chapter 4 – The Code Review Panel

Term of reference 3.1: With reference to 2.1 above, provide advice on process, and recommend representatives to be appointed to the Code Review Panel, which meet the requirements of Section 3.2(2) of the Code.

7.1 The Process

Section 3.2. (2) of the Code establishes the Panel an independent body, free of conflicts. The skills and experience sought in the Panel's members are fit-for-purpose, however the Panel's composition is primarily representative-based. A skills matrix is typically used to guide the structure of a governing entity as it informs the entity of the skills and experience needed for the present and the future. A skills matrix is a reliable tool for Panel recruitment when each candidate does not conform with the discrete 'representative' criterion.

It has been recommended that the Code Review Panel perform a number of additional functions – refer to sections 7.6.2 and 7.6.5.

7.2 Representatives

The Review found there was a reasonable level of support for both supply-side and demand-side representation on the Committee.

General feedback on the Panel's composition included:

- the Panel's composition was "missing experience in financial services which was important if we want to grow the industry".
- "the Panel should not have someone closely related to the carbon industry".
- "the Signatory with a breach should be able to select someone on the Panel to review their case".
- comments on the challenge of finding independent Panel members in a "tight industry".
- "a government representative should be there".
- "...the Chair should be someone with a high profile, a leader in Australian government or private sector".
- "there should be full representative across the value chain as voluntary demand is significantly increasing".
- "the chair should be someone completely impartial".
- "have to have someone to represent the farmers although it doesn't have to be a farmer".

- "there are not enough people on the Code Review Panel, there should be 8 people to review the Code".
- "what about the Clean Energy Regulator as a demand-side rep… if the CER had observer status, that might not be a bad outcome".
- "A member could be from the demand-side of the industry. The Australian Industry Greenhouse Network could be approach to nominate someone. The demand side has interest in the 'social value' of the credits".
- It was noted that including someone from the project developers could have a conflict of interest. This member could gain information about other Signatories' behaviour and may be reluctant to make recommendations that impact the project developer community.
- Another stakeholder suggested that the panel should include someone with legal qualifications.

7.2.1 Advice and recommendations

The list candidates meet the criteria. The skills and experience sought in the Panel's members are fit-for-purpose however the Panel's composition is representative-based. A skills matrix is typically used to inform the composition of a governing entity as it sets out the skills and experience needed *as a whole* for the present and the future roles of the entity. A skills matrix would be useful in recruiting the Panel when candidates do not conform with the strict 'representative' criterion – it can indicate whether the Panel as a whole has the range of skills and experience required, independent of the members' 'representative' status.

The Code Review Panel will provide the Australian carbon industry with leadership, direction and accountability. It follows that the Panel's member nomination process should be transparent, formal and efficient and have the objective of establishing and maintaining the Panel's professionalism. A Nominations Committee comprising volunteer members from key Code Supporters could be charged with the responsibility of nominating, screening and appointing the Code Panel Members.

34. It is recommended that the Panel member selection process have regard to the skills and experience needed by the Panel as a whole. In addition, the nomination, screening and appointment of Code Panel Members should be undertaken by a Nominations Committee whose members are drawn from key Code supporters.

35. Optional: it is recommended that Section 3.2(2) of the Code be amended so that it lists the skills and experience that the Panel as whole requires, and deletes references to ‘representative’.

8 Chapter 5 – The Code Administrator

Term of reference 4.1: Provide advice and recommendations on the resources required to administer the Code in alignment with best practice administration during the Operational Stage, including, but not limited to staffing full time equivalent (FTE), annual signatory fee commitments and non-signatory fee funding commitments.

8.1 Compliance function and Panel support resources

Based on the range of compliance governance processes needed to support the Code in its Operational Stage, the roles of Compliance Manager and a Governance & Secretariat officer are recommended. The indicative cost is approximately $340,000 in the 2020/21 year, rising to $357,213 by 2022/23. The total indicative cost over the first three years is estimated to be $1.045m. The cost model is provided in Appendix 2.

Role	**Description**
Panel Chair and Members	As set out in the Code
Compliance Manager Minimum 3-5 years experience Tertiary qualifications	Develop compliance plan & execute the compliance activities set out in the Code and the Code's procedures. Develop Code and compliance guidance and facilitate training for Signatories. Respond to signatory queries. Manage compliance systems, data and files. Receive and assess breaches and complaints Provide support to Panel, prepare reports and recommendations, assist the Panel in conducting its inquiries.
Governance & Secretariat role	Convene Panel meetings, schedule meetings, liaise with Chair and members, and Signatories. Request, collate, review and circulate Panel papers. Take meeting minutes, administer & retain Panel records. Organise meeting venue, technology and travel arrangements for Panel Chair and members. Administer registers e.g. conflicts of interests, relevant interests. Schedule and deliver governance calendar. Support the Chair, Panel members and Compliance Manager.

8.2 Signatory fee funding

Signatory fees are based on the volume of project activity at the time of a signatory's application and range from $12,500 p.a. for Category 1 Signatories to $2,500 p.a. for Adviser only Signatories. Fee details are set out in Appendix 2.

The Review observes that there are clear financial advantages derived from Code Signatory status.

The QLRF Investment Application process requires the party to its investment agreements to be a Code Signatory or to employ a Code Signatory. The QLRF requirement *valorises* Signatory status by recognising the reputational capital of the Code and its Signatories. Additionally, by making Signatory project participation an essential component of QLRF projects, Signatories are assured of future demand for their services from QLRF projects. This in turn provides greater financial certainty. Finally, the QLRF will consider proposals for projects to receive an initial up-front payment for capital necessary to start their project. This last feature of the QLRF may provide a unique financial advantage to proponent Signatories.[30] If other states offered similar schemes, further financial advantages would accrue to Signatories.

It is appropriate for the Code Administrator to periodically adjust Signatory fees for inflation, particularly in the Operational Stage of the Code when the compliance and governance resources increase. We note that embedding Signatory status as an eligibility criterion for scheme participation may increase the number of Signatories and fees. The compliance workload would correspondingly increase.

In setting its fees, the Code Administrator should have regard to a range of factors including:

(1) the financial value-add of Signatory status to Signatories
(2) ensuring fees rise in line at least with inflation
(3) ensuring the ongoing compliance and governance resources required to give effect to the Code are adequately funded and consistent with the level of support provided to the various categories of Signatories (i.e that Code administration be self-funding), and
(4) any financial support provided by statutory scheme administrators who are mutually dependent on the Code's ongoing integrity.

[30] https://www.qld.gov.au/__data/assets/pdf_file/0022/116545/QLRF-investment-application-guidelines.pdf page 4.

8.3 Non-signatory fee funding

See discussion of new signatory categories of Demand-side and Government supporters.

8.3.1 Recommendations

The Review speculates that the Code Signatory status may be embedded as an eligibility criterion in more statutory schemes in the future. If that eventuates, it is reasonable to pursue funding from the relevant government as it would generate work for the Code Administrator in the form of more Signatories to support, from additional scrutiny of the Code Administrator's processes, and from stakeholder relationship management.

Feedback received during the Review attested to the high volumes of work that follow a Code's integration into a statutory scheme. In principle, government funding should be pursued when a statutory scheme embeds Code Signatory status into the Scheme's rules.

36. It is recommended that Signatory fees be reviewed annually and take into account inflation, the financial benefits of Signatory status, the variable resources required to effect the Code, and the level or financial support provided by Code stakeholders. In line with the CMI being a not-for-profit, the need to recover costs, net of other funding, should guide Signatory fee levels.

8.4 Administration of the Code

Term of Reference 4.2: Provide advice and recommendations on whether the Carbon Market Institute or another body is the most suitable entity to impartially administer the Code as the Code Administrator during the Operational Stage.

Term of reference 4.3: If the recommendation is that the CMI should administer the Code during the Operational Stage, provide advice and recommendations on the internal governance requirements needed for the Carbon Market Institute to effectively operate as the peak industry body and act as the Code Administrator with appropriate integrity (e.g. internal firewalls, information flows).

A majority of stakeholders considered that the CMI was suitable to impartially administer the Code as the Code Administrator during the Operational Stage. Alternative entities considered were universities and legal firms, however, neither alternative was compelling.

8.4.1 Conflicts of interest

The conflicts that might arise with the CMI functioning as an industry association and also the industry regulator were acknowledged. It was noted that both the role of and the independence of the Code Review Panel together with a Signatory's right to appeal the decisions of the Code Administrator (section 3.9) allay some of these concerns. The Code Administrator may also refer a breach to the Panel (section 3.5(2)(h)).

If the CMI becomes the Code Administrator, it would be prudent for it to establish a framework for handling conflicts of interest. At a minimum, potential conflicts should be identified, recorded and processes to avoid, disclose or control the conflict should be implemented.

8.4.2 Suspension and severe sanctions

The Review carefully considered the recommendations from an experienced industry code administrator for the Code Administrator to have a heightened awareness of the adverse commercial impact of severe sanctions and suspensions. Decisions to apply severe sanctions or suspensions should not be made lightly.

Publication of a severe breach or suspension may adversely affect a Signatory's eligibility to participate in statutory schemes both initially and on an ongoing basis.

In the first three years of the Operational Stage of the Code, the Code Administrator's procedures *should require it* to refer proposals to apply severe sanction/s or suspensions/s to the Code Review Panel for its review.

Importing the Code Review Panel's capabilities via the review will provide independent, high quality scrutiny of decision making whilst the Code Administrator develops its capabilities. In addition, the Code Administrator will benefit from a skills transfer.

To be clear, publications of suspensions and severe sanctions should not occur prior to the Code Review Panel reviewing and affirming the Code Administrator's decision. If the Administrator and Panel disagree, the Panel's decision should hold.

8.4.3 Confidentiality, record keeping and information

The Code Administrator should ensure it effectively manages its information security. Appropriate measures should be in place to ensure the confidentiality, integrity and availability of its information assets. It must have regard to the criticality and sensitivity of its information and ensure it has in place operational and technology controls to appropriately protect its information flows. It must ensure the identity of a complainant is dealt with confidentially except to the extent that it is necessary to investigate a complaint effectively and sensitively.

8.4.4 Operational structure

The success of the Code and the effectiveness of the Code Administrator is dependent upon its leadership and commitment. As noted before in this Review, Code Signatory status is the indicator of reputable leadership in carbon project management and advice. Resources allocated to Code Administration, including staffing and systems, must be adequate to the task. To ensure ongoing, high-level sponsorship of the Code Administrator function, the reporting line of the Compliance Manager should take into account the need for access to and ongoing support from the CEO and/or the Chair of the Code Review Panel.

8.4.5 Code Administrator Performance

The Code Administrator's performance should be reviewed regularly and independently, ideally every three years by an independent reviewer as part of the Code's required tri-annual independent reviews. The decision to re-appoint the Code Administrator (or not) should be informed by this review, the views of the Code Review Panel in its Annual report, and through broader stakeholder consultation. The Code should be amended in sections 3.1(1), 3.10(4) and 3.10(5) to effect this change.

37. It is recommended that the Carbon Market Institute administer the Code of Practice during the Operational Stage.
38. It is recommended that a conflicts of interest framework be implemented if the CMI is appointed to administer the Code.

39. It is recommended that in the first three years of the Operational Stage of the Code, the Code Administrator implement a procedure to refer proposals to apply severe sanctions or suspensions to the Code Review Panel. During that time, publication of severe sanctions and suspensions should not occur until the Code Review Panel affirms the Code Administrator's proposal. The Code Review Panel's decision will hold.
40. It is recommended that the Code Administrator implement appropriate controls to manage the security and confidentiality of its information assets.
41. It is recommended that the Compliance Manager's reporting line must provide them with ongoing high-level support and access.
42 It is recommended that the Code Administrator's performance be reviewed every three years as part of the tri-annual independent review. The decision to re-appoint the Code Administrator (or not) should be informed by this review, the views of the Code Review Panel in its Annual report, and through broader stakeholder consultation. To give this effect, it is recommended sections 3.1(1), 3.10(4) and 3.10(5) of the Code be amended.

9 Chapter 6 – Miscellaneous

9.1 Fees and utilisation of Code brand mark

Term of reference Miscellaneous 1.1: Provide advice on the suitability of allowing more than one entity to become a Signatory to the Code under the one Signatory Fee (e.g. should a subsidiary or related entity of a Signatory be able to utilise the Code brand mark as a Signatory to the Code, without separately applying to become a Signatory?).

No objections were raised by stakeholders on fee sharing.

The Review found it was reasonable for more than one entity to become a Signatory to the Code under the one Signatory Fee, provided the entities were part of the one corporate group, as set out below:

Fee paying entity	**Other permitted entities**
Parent company	Subsidiary companies
Subsidiary company	Parent company Affiliates – subsidiaries of the same parent company

9.1.1 Recommendation

43. It is recommended that more than one entity can become a Signatory to the Code under the one Signatory Fee, subject to those entities being companies within the same corporate group.

9.2 Guidance materials

Term of Reference Miscellaneous 1.2 Provide advice on the suitability of the information, application forms and guidance material provided on the Code website.

The Review refers to the recommendations made in section 6.8.1 under terms of reference 1.1. 1.2 and 2.3.

9.3 Signatory Categories

Term of Reference Miscellaneous 1.3 Provide advice on the suitability and design of a new signatory category or supporter category for purchasers of carbon credits/the demand side of the market to support the Code.

ACCC research suggests that codes of conduct tend to be more effective when the self-regulatory body:

- has widespread industry support;
- comprises representatives of key stakeholders, including consumers, consumer associations, the government and other community groups; and
- operates an effective system of complaints handling.[31]

Overall, stakeholders were in favour of a new signatory category or supporter category with one commenting "unless there is significant pushback, it would be good to have the full value chain represented. It's a signal from the demand-side".

The Review notes that a number of demand-side corporates have the sites, financial resources and the expert project development teams to undertake their own carbon projects and operate on the supply-side of the market as well. How this will influence a decision to sign up as a supporter rather than as a Signatory is unclear.

A supporter category for participants on the demand-side of the market was favoured and the Review notes the feedback from many stakeholders on the increasing demand for ACCUs and other carbon offsets in the voluntary market.

9.3.1 Recommendation

44. It is recommended that a supporter category be created. It is also recommended that the CMI do further consultation with corporate stakeholders participating in both the demand-side and supply-side to gauge their level of interest in becoming supporters of the Code, rather than Signatories to the Code.

[31] https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf page 4.

9.4 Demand-side Industry Standards

Term of Reference Miscellaneous 1.4: Provide advice on the extent to which the Code text can support the development of industry standards relevant to the demand side of the market (e.g. standardised carbon contracts).

Stakeholder feedback indicated that market participants are best placed to develop and modify transaction agreements. The Review notes:

- many demand-side participants have access to legal expertise; and
- template agreements have been developed for the spot and forward trades in ACCUs.

The Australian Financial Markets Association's Environmental Products Spot Physical Contract[32] is a short form contract for the spot physical purchase of environmental products including ACCUs, small-scale technology certificates (STCs) and large-scale generation certificates (LGCs). Spot transactions are normally settled on the same day as the trade is negotiated, or within a few business days after trade date. AFMA does not recommend this contract for longer term transactions. The contract is for physical transactions which are settled by the transfer of ACCUs (and others) and it is not appropriate for cash settlement.

There appears to be no industry-wide forward contract template but the QLRF Project Investment Agreement[33] provides a reference. The differences between the two contracts are summarised in the table below.

	AFMA Environmental Product Spot Contract	**Qld Land Restoration Fund Project Investment Agreement (certain provisions only)**
Edition	February 2017	2020
Spot and /or forward trades	Spot, same day or short term settlement	Forwards
Product Coverage	ACCUs, STCs, LGCs, KACCUs, ESCs, GRECs, VEECs, NKACCUs	ACCUs only
Refers to Co-benefits	No	Yes, exclusive right from related project

[32] https://afma.com.au/afmawr/_assets/main/LIB90032/Spot%20Contract%20February%202017.doc

[33] https://www.qld.gov.au/__data/assets/pdf_file/0027/117684/QLRF-project-investment-agreement.pdf

Co-benefits

Market institutions are exploring ways to brand co-benefits (like Indigenous employment opportunities) from projects that go beyond carbon abatement.[34] The Climate Solutions Fund has this work underway. Tracking trading in co-benefit branded ACCUs requires modifications to market registries and contracts.

The AFMA contract does not mention co-benefits and may require modification.

The QLRF agreement reflects its bespoke arrangements with ERF proponent Signatories.

The Code Administrator's role should focus on representing the demand-side's needs to the market and facilitating modifications.

9.4.1 Recommendation

45. It is recommended that the Code Administrator inform the Australian Financial Markets Association and the Clean Energy Regulator of the contractual needs of demand-side participants, to facilitate the modification of contracts for the trading co-benefit branded ACCUs.

9.5 Investment in the Code

The Code's performance as a key regulator of the carbon industry has been positive to date with an observed 100% full or foundational compliance from Signatories.[35] The commitment from Signatories to improve business processes and operate at a best practice standard has been ably demonstrated and strengthens the business case for continued multi-level regulation of the Australian carbon industry.

The products of this model of regulation include complementary rule-making, a degree of self-regulation and a shared responsibility for standards of conduct in the complex carbon industry. Section 3.10(4) of the Code embeds an independent review of the Code, Code reporting, the Code Review Panel and its terms of reference every three years, providing for uncontroversial change as the carbon industry evolves.

[34] http://www.cleanenergyregulator.gov.au/csf/Pages/Home.html#development

[35] http://marketplace.carbonmarketinstitute.org/wp-content/uploads/2019/10/2019-Administrator-Annual-Report-Australian-Carbon-Industry-Code-of-Conduct.pdf

The business case for further investment in the Code by its private and public sector stakeholders is warranted based on:

- the Code's standard setting;
- the Code's effective and efficient regulation of Signatory conduct and the favourable industry outcomes yielded to date; and
- the complementary sanctions available to the Code Review Panel.

It can be argued that the Code acts as a highly efficient regulator, supplementing the surveillance, auditing, monitoring and enforcement done by the industry's public regulators and stakeholders. This is borne out by the place it occupies at the entry point to the QLRF.

In addition to the regulatory benefits for the industry the code provides valuable assurance to private and public purchasers of offsets. This minimises risks to quality of supply as well as reputation and allows for greater confidence in future investment.

As noted above the Code Administration should be self-funded from Signatory, demand-side and Government support.

9.5.1 Recommendation

46. It is recommended that the Carbon Market Institute on behalf of the Code Signatories should pursue funding from government and other key stakeholders to support the continued efficient, shared regulation of participants in the Australian carbon industry.

10 Background to the Review

Section 1.6(4) of the Code requires that an independent review of the Code be undertaken prior to commencement of the Code's Operational Stage, in order to appropriately consider and implement the transitional requirements necessary for elements of the Code to come into effect.

Section 1.6(4)(a) of the Code requires that Terms of Reference for the Review will be determined having regard to matters such as the Code, Code reporting, the Code Administrator, appointment of the Code Administrator, establishment of the Code Review Panel and the Code Review Panel Terms of Reference, and following consultation with Signatories to the Code.

Section 1.6(4)(b) of the Code requires that the Review will be undertaken by a suitably qualified, independent person/body, the Reviewer. In completing the Review, the Reviewer will have access to all necessary documentation required to undertake the Review, including procedures and reporting from the Code Administrator.

Section 1.6(4)(c) of the Code requires that the Review process will include consultation with Signatories to the Code, the Code Administrator and relevant stakeholders including the Department of the Environment and Energy and the Clean Energy Regulator.

Section 1.6(4)(d) of the Code requires that the results of the Review must be published online and Signatories to the Code may vote on recommendations which may be made by the Reviewer.

Section 1.6(5) of the Code states that Commencement of the Operational Stage will only take place following consideration and, where applicable, implementation of the recommendations of the Review.

11 Terms of Reference

The Code

1.1. Provide advice on the extent to which the Code text and requirements in Section 2 of the Code currently meet the objectives of Section 1.1 of the Code, to

(1) Define industry best practice for project developers, agents, aggregators and advisers in Australia's carbon project industry.
(2) Promote consumer protection and appropriate and open interaction with project owners and landowners.
(3) Provide guidance to scheme participants.
(4) Promote market integrity, accountability and display international leadership in carbon project development.

1.2. Provide advice and recommendations on the extent to which Section 2 of the Code could be amended for the Operational Stage to better ensure the achievement of Section 1.1 of the Code and the outcomes and underlying principles in Section 1.3 of the Code, taking into consideration:

1.2.1. The economic and administrative burden for Signatories of the Code to effectively comply with the requirements of an amended Code.

1.2.2. Changes by relevant regulatory or administrative agencies (e.g. the Clean Energy Regulator, ASIC, Department of Energy and Environment) to improve (streamline and make more efficient) and update regulation of the market, that may interact with, or duplicate Signatory compliance and Code administration activities.

Administration of the Code

2.1. Review and make recommendations for the governance and operational procedures required to administer Sections 3.2, 3.3(1), 3.4(2), 3.5, 3.7, 3.8, 3.9, 3.10(4), 3.10(5) of the Code, which will become operative during the Operational Stage of the Code.

2.2. Review and make recommendations to improve current governance and operational procedures that have been utilised by the Code Administrator to administer all operative sections of Section 3 and Section 4 of the Code during the Foundation Stage.

2.2.1. Provide advice and recommendations on the extent to which Section 3 and Section 4 of the Code could be amended for the Operational Stage to improve the administration of the Code.

2.3. Recommend guidance and/or training material and events covering Code Signatory Obligations set out in Section 2 of the Code, to be prepared, published and/or delivered by the Code Administrator for the Operational Stage, providing Code Signatories a better understanding of their obligations and the detail necessary to effectively comply with the Code.

The Code Review Panel

3.1. With reference to 2.1 above, provide advice on process, and recommend representatives to be appointed to the Code Review Panel, which meet the requirements of Section 3.2(2) of the Code.

The Code Administrator

4.1. Provide advice and recommendations on the resources required to administer the Code in alignment with best practice administration during the Operational Stage, including, but not limited to staffing full time equivalent (FTE), annual signatory fee commitments and non-signatory fee funding commitments.

4.2. Provide advice and recommendations on whether the Carbon Market Institute or another body is the most suitable entity to impartially administer the Code as the Code Administrator during the Operational Stage.

4.3. If the recommendation is that the CMI should administer the Code during the Operational Stage, provide advice and recommendations on the internal governance requirements needed for the Carbon Market Institute to effectively operate as the peak industry body and act as the Code Administrator with appropriate integrity (e.g. internal firewalls, information flows).

Miscellaneous

1.1. Provide advice on the suitability of allowing more than one entity to become a Signatory to the Code under the one Signatory Fee. (eg should a subsidiary or related entity of a Signatory be able to utilise the Code brand mark as a Signatory to the Code, without separately applying to become a Signatory).

1.2. Provide advice on the suitability of the information, application forms and guidance material provided on the Code website.

1.3. Provide advice on the suitability and design of a new signatory category or supporter category for purchasers of carbon credits/the demand side of the market to support the Code.

1.4. Provide advice on the extent to which the Code text can support the development of industry standards relevant to the demand side of the market (e.g. standardised carbon contracts).

12 Appendix 1 –The Australian Financial Services Regime

Australian Financial Services Licences

The Australian Securities and Investments Commission (ASIC) issues AFSLs in its role as regulator of the financial services industry. Australian carbon credit units (ACCUs), and certain other emissions units are defined as financial products under the *Corporations Act 2001* (Cth)[36]. As a result, participants in the carbon markets may require an AFSL to conduct a business involving ACCUs and other emissions units.

The authorisations on an AFSL vary from licence to licence, and can be broad or limited. Some licensees may be authorised to engage with wholesale clients only. Licence authorisations permit licensees to do some or all of the following in relation to ACCUs and/or carbon units: make a market in, advise, deal, acquire, apply for, vary and dispose, act on the Signatory's own account, and/or act on behalf of others.

The Australian Financial Complaints Authority (AFCA)

AFCA's remit is broad – the complaints it will address include:

- advice that wasn't in the best interests of the complainant, that was inappropriate or insufficient.
- information that the complainant wasn't given about the product including fees or costs, or information that was misleading or insufficient (including the risk of an investment product).
- instructions that were not followed or where there was a delay in auctioning them.
- privacy and confidentiality breaches.
- transactions that were incorrect or unauthorised.

[36] https://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-236-do-i-need-an-afs-licence-to-participate-in-carbon-markets/ page 4.

13 Appendix 2 – Indicative Compliance Costs

Compliance function indicative costing

Function	Detail	Resource	Cost category	Cost driver	Budget '20/21	Budget '21/22	Budget '22/23
Code Review Panel governance	Panel member remuneration	2 members @$40,000 each Chair @ $50,000	Fixed	market rates	$130,000	$133,250	$136,581
Code Administration	Compliance manager, 3-5 years' experience	1 FTE	Fixed	market rates	$150,000	$153,750	$157,594
Governance & Secretariat	Panel secretary / compliance support officer	0.5 FTE	Fixed	market rates	$60,000	$61,500	$63,038
					$340,000	**$348,500**	**$357,213**

Total cost over 3 years **$1,014,956**

Assumptions: 2.5% inflation rate applied to remuneration.

Signatory Fee Details

Category 1 – Signatory is involved with 15 of more projects: $12,500 p.a.

Category 2 – Signatory is involved with between 5 and 14 projects: $5,000 p.a.

Category 3 – Signatory is involved in less than 5 projects: $2,500 p.a.

Signatories providing advisory services only are charged $2,500 p.a.

14 Glossary

AFCA	Australian Financial Complaints Authority
AFMA	Australian Financial Markets Association
AFSL	Australian Financial Services License
ACCC	Australian Competition and Consumer Commission
ACCU	Australian Carbon Credit Unit
ASIC	Australian Securities and Investments Commission
CEC	Clean Energy Council
CER	Clean Energy Regulator
CFI	*Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth)
CMI	Carbon Market Institute
Code	The Australian Carbon Industry Code of Conduct
CSF	Climate Solutions Fund
EIH	Eligible interest holder
ERF	Emissions Reduction Fund
FPIC	Free, prior and informed consent
FPP	Fit and proper person
NFF	National Farmers Federation
Proponent	The person who has the legal right to carry out an ERF offsets project and is responsible for the project.
QLRF	Queensland Land Restoration Fund
QLRF	Queensland Land Restoration Fund
QRIDA	Queensland Rural and Industry Development Authority