

Consultation paper: Benefit sharing for the fixed delivery exit process

In 2021, Australian carbon market participants raised concerns that the increasing difference between prices set in early carbon abatement contracts (CACs) with the Commonwealth and pricing in the private market was causing market instability. This risked a disorderly exit from fixed delivery contracts.

Market participants that were advocating for a new arrangement said that resulting benefits should be shared.

In response, the Government settled on an exit arrangement from fixed delivery contracts, based on the buyer's market damages provisions in the CACs.

On 9 March 2022, the Clean Energy Regulator (the agency) [announced](#) that feedback will be sought on how to ensure a fair sharing of the financial benefits that result from exiting fixed-contract delivery obligations.

The agency is now consulting on a fair and reasonable way to share benefits from the exit arrangement.

Background

As announced on 4 March 2022, current holders of fixed delivery contracts will now be able to pay an exit fee to be released from fixed delivery obligations to the Commonwealth under a [new initiative](#) being offered by the agency.

The exit arrangement has been carefully designed to build on existing provisions in the Emissions Reduction Fund (ERF) contracts that allow contract holders to pay a penalty for defaulting on a given milestone delivery of Australian carbon credit units (ACCUs). This new exit arrangement was deliberately designed as a "minimal change" so rights under the ERF contract were not substantially altered.

The proposals in this paper are intended for consultation purposes only. The final guidance and accompanying forms are expected to be published on the agency's website by late April, subject to feedback received during public consultation.

Proposed benefit sharing framework

What is benefit sharing?

'Benefits' refer to the additional revenue (net of the exit fee) obtained or expected to be obtained as a result of exiting fixed delivery contract milestones and selling ACCUs for higher prices than the contract may have provided. Benefit sharing is the allocation of this revenue between the relevant parties.

What is the purpose of the benefit sharing framework?

The benefit sharing framework sets out the requirements and expectations to support benefit sharing on a fair and reasonable basis. The sharing needs to occur in a manner consistent with community expectations associated with contractual flexibility being offered by the Commonwealth and earlier undertakings by carbon market participants.

What is the benefit sharing requirement?

The agency's expectation is that the benefit will be shared in a fair and reasonable way between parties that benefited from the CAC and will be reached through mutual agreement.

Benefit sharing arrangements must be agreed prior to applying for the exit arrangement.

Evidence of agreement between parties is required in the format of a declaration and signatures from each relevant party as part of the application process for the exit arrangements.

What is meant by fair and reasonable benefit sharing?

In the context of benefit sharing, fairness would be subject to a 'reasonable person' test (i.e., the reasonable person represents a judgment as to how a reasonable member of the community should behave in particular situations).

This expectation of fair and reasonable benefit sharing relates to the Commonwealth providing a new opportunity for the contract holder that is likely to lead to increased financial returns.

Who does the benefit sharing framework apply to?

It is proposed that the benefit sharing framework will apply to:

- the carbon abatement contract (CAC) holder ('the contract holder'), **and/or**
- the landholder(s) or facility owner(s) ('the landholder/facility owner') with an interest in the CAC through a service agreement with the contract holder.

The scenarios that are subject to benefit sharing requirements are outlined in *Table 1*.

Table 1: Parties and arrangements subject to benefit sharing requirements

Scenario	Does the benefit sharing requirement apply?
The CAC holder and landholder is the same party. There are no other relevant parties directly involved.	No. Not needed.
The CAC holder and landholder is the same party. The CAC holder is being supported by a carbon service provider, who is listed as an agent on the contract.	Yes.
The CAC holder is a carbon service provider. The landholder(s) is a separate party(s) to the carbon service provider.	Yes.

Other parties may have an ongoing financial interest in the project or may have an earlier financial interest that has been since been waived. These parties are out of scope of the benefit sharing framework however, this framework does not prevent benefits from also flowing to these parties if that is the wish of the relevant parties.

The agency requires that there is agreement that is fully informed and freely given between the relevant parties. The Clean Energy Regulator will not assess the adequacy or appropriateness of an agreement.

Other regulatory requirements related to the exit-arrangements, benefit sharing, and advice upon or sale of ACCUs may also apply and will need to be complied with. For example, Australian Financial Services Licence (AFSL) requirements or any other regulatory requirements.

Questions for feedback

What are your views on the proposed benefit sharing framework? Are there other options that should be considered? Please provide details in your submission.

1. Do you support a benefit sharing arrangement?
2. If yes, what features would a fair and reasonable benefit sharing framework have to help ensure financial gains created for the contract holder by the exit arrangement can flow to other relevant parties to the contract, depending on the situation?
3. Taking into consideration the many arrangements that may exist between carbon service providers and landholders or facility owners, how should the benefits flow?
4. What matters may affect reaching a fair and reasonable benefit sharing agreement?
5. Should landholders that are CAC holders be able to access the exit arrangement without the agreement of CSP agents on benefit sharing if reasonable efforts to reach such an agreement are unsuccessful? If there are legal, contractual or other barriers to doing so, please tell us what they are.
6. What other considerations should be taken into account? Please provide details.

Make a submission

Submissions are due by **5 pm, Monday 11 April 2022**. Any submissions received after this date will be considered at the Clean Energy Regulator's discretion.

It is preferred that submissions be submitted electronically to the below email address. Submissions may be posted to the below postal address if required.

Please include the submission coversheet with your submission.

Email address (preferred):

erf-contracts@cleanenergyregulator.gov.au

Postal address:

Method Development and Purchasing Branch
Clean Energy Regulator
GPO Box 621
Canberra ACT 2601

[Contact us](#) for more information.

Confidentiality and privacy

The agency will treat all submissions as public documents, unless the author requests the submission be treated as confidential. Public submissions may be published in full on the agency's website. If published, the agency will publish the name of the individual or name of the organisation and state or territory with your submission.

A request may be made under the *Freedom of Information Act 1982* (Cth) for a submission marked 'confidential' to be made available. Such requests will be determined in accordance with provisions under the *Freedom of Information Act 1982*.

The agency will deal with personal information contained in, or provided in relation to, submissions in accordance with the [privacy policy](#).