



The fit and proper person status - minimum performance expectations for project proponents who are carbon service providers in the Emissions Reduction Fund

Purpose

The purpose of this guidance is to clarify the Clean Energy Regulator's (the agency's) expectation of minimum performance for project proponents who are carbon service providers¹ (CSPs). Their performance can be taken into account when the agency is assessing a person or company's fit and proper person (FPP) status.

The FPP test is applied at various stages of a project lifecycle, including when Australian Carbon Credit Units (ACCUs) are applied for. Certain acts (including conviction for certain offences) have an automatic effect on fit and proper person status. However, the agency has a wide discretion to take into account any matter it considers relevant.

This guidance should be read in conjunction with Section 60 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) and associated legislative rules.

The role of CSPs

CSPs play a critical role in the Emissions Reduction Fund (ERF) scheme. They enter into a commercial agreement with landholders or landowners who grant them legal right to undertake the ERF project and to receive ACCUs. Such agreements cover matters including obligations on each party in relation to the project and apportionment of the proceeds of the ACCUs issued for the project.

The fit and proper person test and powers of the agency

The agency is not a party to these contracts and has no powers to regulate the terms of these contracts. Landholders and landowners should refer to other guidance the agency publishes in relation to how they can participate in the ERF ([Clean Energy Regulator Method Development](#)).

However, if CSPs contract on unfair terms with landholders/landowners and/or carry out their role in an incompetent manner or inconsistent with sound business practices this may be grounds for the agency to determine the CSP is not fit or proper and is therefore ineligible to participate in the ERF. This in turn may

¹ Carbon service providers (CSPs) are project proponents as defined in the CFI Act where they are authorised to be the project proponent and conduct Emissions Reduction Fund (ERF) Projects by parties who hold legal right (typically landholders or landowners). They are sometimes referred to as 'aggregators'.

result in other landholders/landowners not being willing to participate in the scheme which would undermine one of the Objects of the CFI Act - to incentivise people to carry on offsets projects.

If the agency finds that a CSP is not fit and proper, the agency may revoke the declaration for all the offsets projects for which the CSP is project proponent (refer section 36 of the CFI Act) and refuse to issue ACCUs (section 15 of the CFI Act). If a project is at risk of revocation, the agency is required to consult other parties who may have legal right such as the landholder/owner. These other parties may be eligible to apply to 'step in' as a project proponent, continue the project, and consequently avoid the project being revoked.

Agency expectations of a fit and proper CSP

The following guidance has been derived from cases where the agency has reviewed/investigated the FPP status of CSPs. It is not exhaustive but signals a minimum standard of expected performance in key areas by CSPs conducting their business.

The agency expects that a fit and proper carbon service provider will:

1. Not engage in false or misleading or inappropriate behaviour. This includes being fully transparent in their dealings with landholders and other interest holders regarding ERF projects. For example:
 - Fully explain how the scheme operates and provide simple explanations of the contract being offered and its key terms.
 - Encourage, and provide opportunity, for landholder/owners to obtain independent legal advice before signing the contract.
 - Where a project involves a Registered Native Title body (RNTB) who is an Eligible Interest Holder, the CSP should meet the expectations set in the [CER's Native Title Guidance](#).
 - Advise the landholder/owner and any RNTBs early of any compliance issues that may impact expectations on the number and timing of ACCUs to be issued; and actions/timelines the CPS will pursue to rectify the non-compliance.
 - Not provide financial advice unless they hold an Australian financial services licence; and generally be conservative in information provided on the expected ACCU yield for projects.
 - Not misuse their position, knowledge or market power in a way that would breach consumer protection or competition law.
2. Provide clear, fair and appropriate contract terms. For example:
 - Payment terms should be fair. The agency expects that in most cases, payment terms of no longer than 28 days from the ACCUs being credited is fair.
 - Payments should be accompanied by a clear account statement of the basis on which the payment has been made and by reference to the contract terms. This could, as an example, be the number of ACCUs issued (and date of issue) times the value of the ACCUs according to the contract with the landholder times the percentage share of the landholder less any costs provided for in the contract.
 - Contracts should not contain clauses that would be considered unfair contract terms under consumer protection law.

3. Provide timely transfer of payments or ACCUs.
 - This should include sound business practices to make a complete application to the agency for the crediting of ACCUs as early as practicable and then pay the landholder/landowner promptly. Crediting applications submitted unnecessarily late could mean landholders don't get their cashflow from the CSP in an acceptable and predictable timeframe.
 - CSPs should give advance notice to landholders/owners of the schedule of its proposed crediting applications to the agency.
4. Have systems and processes in place which enable them to meet legal obligations under the scheme including meeting reporting, monitoring and record keeping requirements.
 - This must include trained and competent staff and documented processes which do not rely on a single person as a point of failure for discharging obligations under the scheme.
5. Ensure they and their staff proactively educate themselves on the legal obligations of participation and not rely on the agency correcting their behaviour to bring them into compliance.
 - It is not acceptable that CSPs lodge incorrect, misleading applications or late applications with the expectation the agency will issue reminders or set out a list of requirements in a request for further information.
6. Be honest and proactive in communicating issues with the agency.
 - If a CSP may not be able to, for example, report on time it should contact the agency with an explanation and request an extension of time if the law allows for that. If an extension is granted, the CSP should actively manage the issue and meet the extended deadline complete with all necessary information.
 - Should a CSP realise it has provided false and misleading information to the agency, it should promptly advise the detail of same, provide the correct information, provide an explanation of how the error arose and what it is doing to ensure it provides correct information in the future.

A one-off issue of failing to meet the above expectations for FPP is unlikely to result in the agency reconsidering the FPP status of a CSP, unless the matter is extremely egregious. However, an ongoing pattern of poor performance against the above may result in formal reconsideration of FPP.

In assessing FPP status, the agency takes into account the directors of companies, those in positions of responsibility within companies and staff and advisors. The employment or engagement of an individual who would fail the FPP test may also be taken into account in assessing an entity's FPP status.

Further information may be found in the Clean Energy Regulator's [Compliance policy for education, monitoring and enforcement activities \(cleanenergyregulator.gov.au\)](https://www.cleanenergyregulator.gov.au/compliance-policy-for-education-monitoring-and-enforcement-activities).

How does the Australian Carbon Industry (ACI) Code of Conduct relate to the Clean Energy Regulator's statutory fit and proper person test?

The [ACI Code of Conduct](#) is Administered by the Carbon Market Institute. The Code is voluntary and may, in some areas, set different or higher standards than the agency or the legislation. The agency supports

voluntary industry codes of practice like the ACI Code to enhance the regulation of CSPs and to build confidence in the carbon industry, encourage landholder/owner and Traditional Owner participation, and protect the interests of eligible interest holders.

While the agency's statutory FPP process and the ACI Code are not explicitly linked, in determining whether a person is fit and proper will involve consideration of factors including the person's compliance with industry standards and codes, as well as the nature of their contractual relationship with landholders/owners.

When landholders/owners are conducting due diligence on CSPs before signing a contract with one, whether the CSP is a signatory to the ACI Code (and its Code compliance) could be one line of enquiry. Another could be to speak to landholders and others generally in the industry. The agency does not warrant that ACI Code signatories are or will remain fit and proper. As a general principle, it is important that CSPs provide their clients with enough information to make an informed decision about signing a contract and engaging in project activities.

Where a landholder/owner enters into a contract with a CSP, should contract performance issues arise they should seek to firstly deal directly with the CSP and seek resolution in a normal commercial manner. Should a landholder/owner believe the CSP has breached their contract, then they can seek independent legal advice on their options to enforce the contract.

If the CSP is a signatory to the ACI Code of Conduct, then if the landholder/owner's or eligible interest holder's concern may be covered by the Code, it may be able to seek resolution through the ACI Code [complaints process](#). The agency has no role in this process.

Lodging a complaint and the role of the agency

If a landholder/owner believes its CSP may not be fit and proper (after considering the above guidance), then it may lodge a complaint by emailing CER-Complaints@cer.gov.au or calling 1300 553 542.

However, in considering whether to lodge a complaint with the agency, the landholder/owner should consider whether the behaviour/performance is so egregious or ongoing that the agency could decide the CSP is no longer fit and proper to continue to participate in the ERF scheme. All such decisions of the agency are ultimately reviewable by courts, tribunals and the Ombudsman. These bodies expect that the agency's decisions/actions are appropriate and proportionate with the alleged poor performance or behaviour.

As outlined earlier in this guidance, the agency cannot intervene in contractual disputes between CSPs and landholders/owners. It can only decide whether, on all the information available, the CSP remains fit and proper under the legislation.