



Australian Government
Clean Energy Regulator

**EMISSIONS
REDUCTION
FUND**

Project Resource 2: How does a project proponent demonstrate legal right?

This resource forms part of the Native title, legal right and eligible interest-holder consent guidance.

Released June 2018



Project Resource 2: How does a project proponent demonstrate legal right?

The Clean Energy Regulator expects that project proponents (and their agents and service providers) understand their legal obligations. Project proponents must be able to demonstrate they have the legal right¹ to carry out the project, and where appropriate, they have met the requirements of the *Native Title Act 1993*² (Native Title Act) and all relevant state and territory land-based legislation. Being able to demonstrate the steps the project proponent has undertaken to obtain the legal right (including consultation) is as important as providing evidence of the legal right itself.

Project proponents must provide evidence of legal right to the Clean Energy Regulator:

- when registering the project
- if they wish to vary a project (e.g. add a new area, remove conditions, changing project proponent), and
- with the required project audit reports. Audits will confirm the project proponent has the legal right as per requirements of the Native Title Act, relevant state and territory land-based legislation, eligible interest-holder consents and regulatory approvals.

Project proponents are responsible for obtaining and maintaining legal right throughout the crediting and permanence periods for the project.

Project proponents must maintain records showing how they have or obtained legal right to carry out the project, including the steps they have taken, the advice received, and who has been consulted.

Table 1 provides examples of the types of evidence that a project proponent could capture to demonstrate they have established legal right. Please note this is not an exhaustive list.

The Clean Energy Regulator does not have the authority to form a view about the quality of the information, consultation, and negotiation provided or undertaken by project proponents when complying with Native Title Act obligations. Project proponents are responsible for meeting all legal obligations, and the Clean Energy Regulator may request further information or documentation if the project proponent is unable to demonstrate how project activities might interact with native title determinations or claims over the area, and any relevant state and territory land-based law.

Failure to consider and consult appropriately may also mean the project proponent submits an incomplete application, which could delay a project's registration and start date until appropriate evidence is provided.

¹ <http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Planning-a-project/Legal-right>

² <https://www.legislation.gov.au/Series/C2004A04665>

Table 1: Examples of types of evidence to demonstrate legal right

| LEGAL RIGHT - EXAMPLES OF EVIDENCE | | | | | | | | | |
|------------------------------------|--|---|---|--|--------------|---|--|---|--|
| | | Terms and conditions of the current land tenure | Explanation of how project activities are permitted | State/territory correspondence confirming project activities are allowed | Legal advice | Records of land tenure amendments to allow project activities | Assessment of whether the future acts regime applies | Evidence that Native Title Act notification & consultation requirements have been satisfied | Indigenous land use agreements or agreements with registered native title bodies corporate |
| LAND TENURE CONSIDERATIONS | | | | | | | | | |
| Is the project activity: | permitted under the current land tenure conditions? | ✓ | ✓ | ✓ | ✓ | | | | |
| | not permitted under the current land tenure arrangements? | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| NATIVE TITLE CONSIDERATIONS | | | | | | | | | |
| Is the project activity: | on exclusive possession native title land, and the proponent is not the area's registered native title body corporate? | Land tenure must also be considered | | | | | | ✓ | ✓ |
| | on non-exclusive possession native title land? | | | | | | ✓ | ✓ | ✓ |
| | on claimed native title land? | | | | | | ✓ | ✓ | ✓ |
| | on land without a current native title determination or claim? | | | | | | ✓ | ✓ | ✓ |