



Australian Government
Clean Energy Regulator

EMISSIONS
REDUCTION
FUND

Native title, legal right and eligible interest-holder consent guidance

Released June 2018



Published by the Clean Energy Regulator

© Commonwealth of Australia 2018

This work is licensed under the Creative Commons Attribution 3.0 Australia Licence.
To view a copy of this license, visit <http://creativecommons.org/licenses/by/3.0/au/>.

The Clean Energy Regulator asserts the right to be recognised as author of the original material in the following manner:



© Commonwealth of Australia (Clean Energy Regulator) 2018.

IMPORTANT NOTICE—PLEASE READ

This document is produced for general information only and does not represent a statement of the policy of the Commonwealth of Australia. The Commonwealth of Australia and all persons acting for the Commonwealth preparing this report accept no liability for the accuracy of or inferences from the material contained in this publication, or for any action as a result of any person's or group's interpretations, deductions, conclusions or actions in relying on this material.

Changes to the legislation may affect the information in this document. This document is not intended to provide legal advice. Entities are responsible for determining their obligations under the law and for applying the law to their individual circumstances. Entities should seek independent professional advice if they have any concerns.

Photo acknowledgements: Unless otherwise specified, all photos by Chris Oaten, Arthur Mostead and the Clean Energy Regulator.

Contents

Purpose	4
Executive summary	5
Overview	8
What is the Emissions Reduction Fund?	10
Part 1: Legal obligations and consent requirements for Emissions Reduction Fund projects	12
Project proponents	12
Legal right	12
Eligible interest-holder consent	15
Regulatory approvals	17
Carbon abatement contracts	19
Part 2: Native title and the Emissions Reduction Fund	22
Native title	22
Identifying native title rights and interests over a project area	25
Consideration of future acts	26
Indigenous land use agreements	27
Native title, credit relinquishment and carbon maintenance obligations	28
Emissions Reduction Fund projects on land subject to native title	29
Online project resources	31
Appendix 1: Project registration flow chart	32
Appendix 2: Key concepts	33



Purpose

This guidance sets out the views of the Clean Energy Regulator on the law and practice of how projects under the Emissions Reduction Fund must consider the rights of native title groups and state and territory law. This includes their interactions with the requirement for having legal right to conduct a project and consents for running a project (referred to as eligible interest-holder consent).

This document describes the relevant requirements of the *Native Title Act 1993¹ (Cth)* (the Native Title Act), the *Carbon Credits (Carbon Farming Initiative) Act 2011² (Cth)* (the CFI Act) and touches on the relationship between these Acts and state or territory laws—particularly laws relating to land ownership and pastoral leases.

This guidance is based on current law and the Clean Energy Regulator’s administrative policy. However, this is a complex area of law because of interactions between the relevant Commonwealth, state and territory laws, which may lead to differing legal views. It is not the role of the Clean Energy Regulator to rule on these matters. This document states what the Clean Energy Regulator’s view of the correct interpretation of the relevant provisions of the CFI Act is, but there may remain uncertainties due to the intersect with the Native Title Act, different stakeholder views, and contested areas of legal right.

This guidance will continue to be revised to reflect any future precedents set by courts or tribunals, or new views reached by the Clean Energy Regulator, with respect to Emissions Reduction Fund projects.

Best practices for securing legal right and obtaining eligible interest-holder consents are recommended throughout this document. While the best practice actions recommended under this document may not be the only way to address the matter, Emissions Reduction Fund projects that utilise best practices will reduce legal and commercial risks associated with any uncertainties. Additional benefits may include greater community support for projects, and further streamlining of project assessment and crediting by the Clean Energy Regulator.

Acknowledgements

This document was developed in consultation with, and has benefited greatly from, comments by the Australian Government’s Department of the Environment and Energy, the Attorney-General’s Department, the National Native Title Tribunal, relevant state and territory governments, and relevant stakeholders.

We greatly appreciate the contributions made to this document by key stakeholders, including the Indigenous land councils, state and territory departments, pastoralist peak body representatives, Emission Reduction Fund proponents, agents and aggregators and Registered Greenhouse and Energy Auditors.

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

2 <https://www.legislation.gov.au/Series/C2011A00101/Compilations>



Executive summary

Anyone who carries out an area-based Emissions Reduction Fund project must have the legal right to undertake the project, obtain consents from all eligible interest-holders, and hold all required regulatory approvals for the project before they can receive Australian carbon credit units (ACCUs).

This document offers broad guidance on the Clean Energy Regulator's expectations on these requirements for area-based Emissions Reduction Fund projects on native title land.

All individuals and groups that participate in the Emissions Reduction Fund (project proponents) must be aware that native title groups have rights under the Native Title Act, and these rights must be maintained. Project proponents need to pay particular attention to the future acts regime set out in the Native Title Act as it could affect the legal right to carry out a project. Entering into an Indigenous land use agreement may be one option for proponents to ensure native title requirements are satisfied.

The term 'project proponent' refers to the person or organisation legally responsible for an Emissions Reduction Fund project. This could be a registered native title body corporate, pastoralist, or any other party such as an aggregator.

There remain differing views on the intersect of legal right with statutory decisions under the CFI Act, Native Title Act, and state and territory laws. This guidance cannot and does not set out to settle these differing views. However, it is clear that registered native title bodies corporate are eligible interest-holders for all area-based projects on land the subject of a native title determination. Their consent is required before Emissions Reduction Fund projects can be credited. As such, it is in the interest of project proponents to reach commercial agreements with registered native title bodies corporate to obtain their consent. The time and cost of consultation with the relevant native title groups must be accounted for when proponents are planning projects on land subject to native title.

There are four key considerations to obtaining legal right: the type of project method, native title rights, project area land tenure, and applicable state or territory laws.

Emissions Reduction Fund area-based projects can provide benefits to both native title groups and project proponents where these parties are not the same. Project success is best realised with genuine and early engagement to ensure all parties have a mutual understanding about project conditions and requirements.

To assist with these considerations, the guidance document covers these main points:

1. The project proponent must obtain legal right before lodging an application to register an Emissions Reduction Fund project. A project proponent is a person or entity who is responsible for carrying out the project and holds the legal right to run the project.
2. A project may be conditionally registered, subject to a condition that consents from eligible interest-holders and regulatory approvals must be obtained before the end of the project's first reporting period. ACCUs cannot be issued for a project until all relevant eligible interest-holder consents and regulatory approvals are obtained.
3. Eligible interest-holder consents must be provided either by using the approved consent form³ on the Clean Energy Regulator's website, or by having the consent set out in a registered Indigenous land use agreement.
4. Legal right and eligible interest-holder consent are separate requirements under the CFI Act. The same person or entity might need to provide project proponents with legal right as well as eligible interest-holder consent. In such cases, obtaining eligible interest-holder consent can support and reinforce legal right.

³ <http://www.cleanenergyregulator.gov.au/ERF/Forms-and-resources/apply-to-participate>

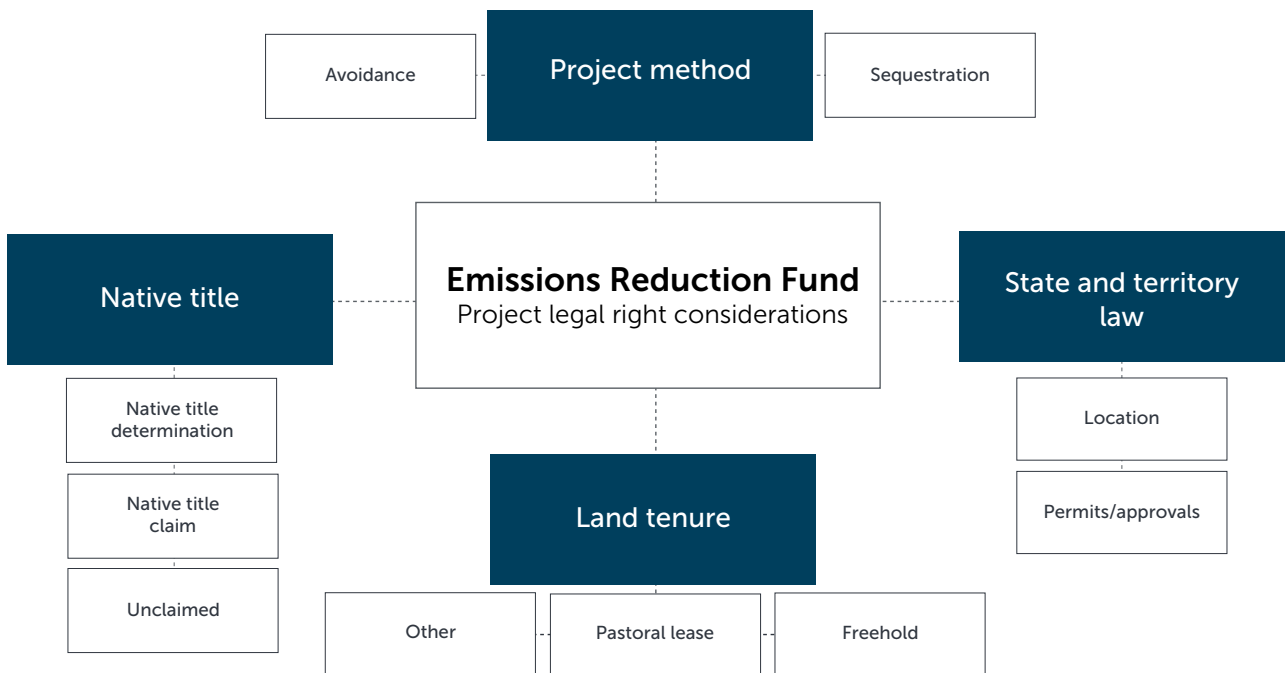
5. Legal right and regulatory approvals are separate requirements under the CFI Act. However, in some cases, obtaining regulatory approvals can support and reinforce legal right.
6. A registered native title body corporate can be the deemed project proponent on exclusive possession native title land.
7. Legal right to undertake a project on land subject to native title may be secured or confirmed by following the future act process detailed in the Native Title Act, or by entering into an Indigenous land use agreement.
8. Project proponents should consult with the relevant state or territory departments to understand whether the project activity described in the method is permitted under the land tenure terms and conditions, or the right to conduct it must be applied for separately.
9. Relevant Indigenous land councils can also provide advice to project proponents on whether the project activity is affecting native title rights.

10. Where the legal right to carry out a project is held by another person or group, the Clean Energy Regulator will require project proponents to demonstrate evidence that they have acquired the right through a written agreement (such as a commercial contract or Indigenous land use agreement).

It is recommended that all project proponents read the guidance document in full and seek professional advice if required before applying to register an Emissions Reduction Fund project.

Native title holders approached by project proponents, or who wish to be involved in the Emissions Reduction Fund, should familiarise themselves with the material covered by this guidance, consider legal, cultural and commercial aspects of the proposed project, and seek independent professional advice.

Figure 1: Project legal right considerations







Overview

This guidance is relevant for area-based Emissions Reduction Fund projects, such as savanna fire management and vegetation type projects.

This document is directed primarily towards project proponents (because they have significant obligations under the Emissions Reduction Fund). However, this resource will also be useful to anyone involved in the Emissions Reduction Fund, including:

- › agents
- › landholders
- › native title holders and claimants, and
- › state and territory land and planning authorities.

This guidance is divided into two parts:

Part 1: Legal obligations and consent requirements for Emissions Reduction Fund projects

Part one of this document provides general information to project proponents about establishing legal right and obtaining consent for Emissions Reduction Fund projects. The information provided in this section explains the requirements to maintain the legal right throughout the life of the project, as well as the requirements to consult and obtain consent from those who hold a defined interest in the project area (called 'eligible interest-holders').

Part 2: Native title and the Emissions Reduction Fund

Part two of this document details the interaction between native title and Emissions Reduction Fund projects. It explains that the process for securing legal right will differ depending on individual circumstances of each project, including how Emissions Reduction Fund project activities may affect native title rights.

For a quick overview of this guide, please see Figure 2 in this document. If you are new to the Emissions Reduction Fund and would like to see a detailed overview of the how to register a project, see Appendix 1: Project registration flow chart. Technical terms used throughout this guidance are explained in Appendix 2: Key concepts.

Online project resources

Additional supporting project resources are available on the Clean Energy Regulator website⁴, which are intended to assist project proponents establish and demonstrate legal right.

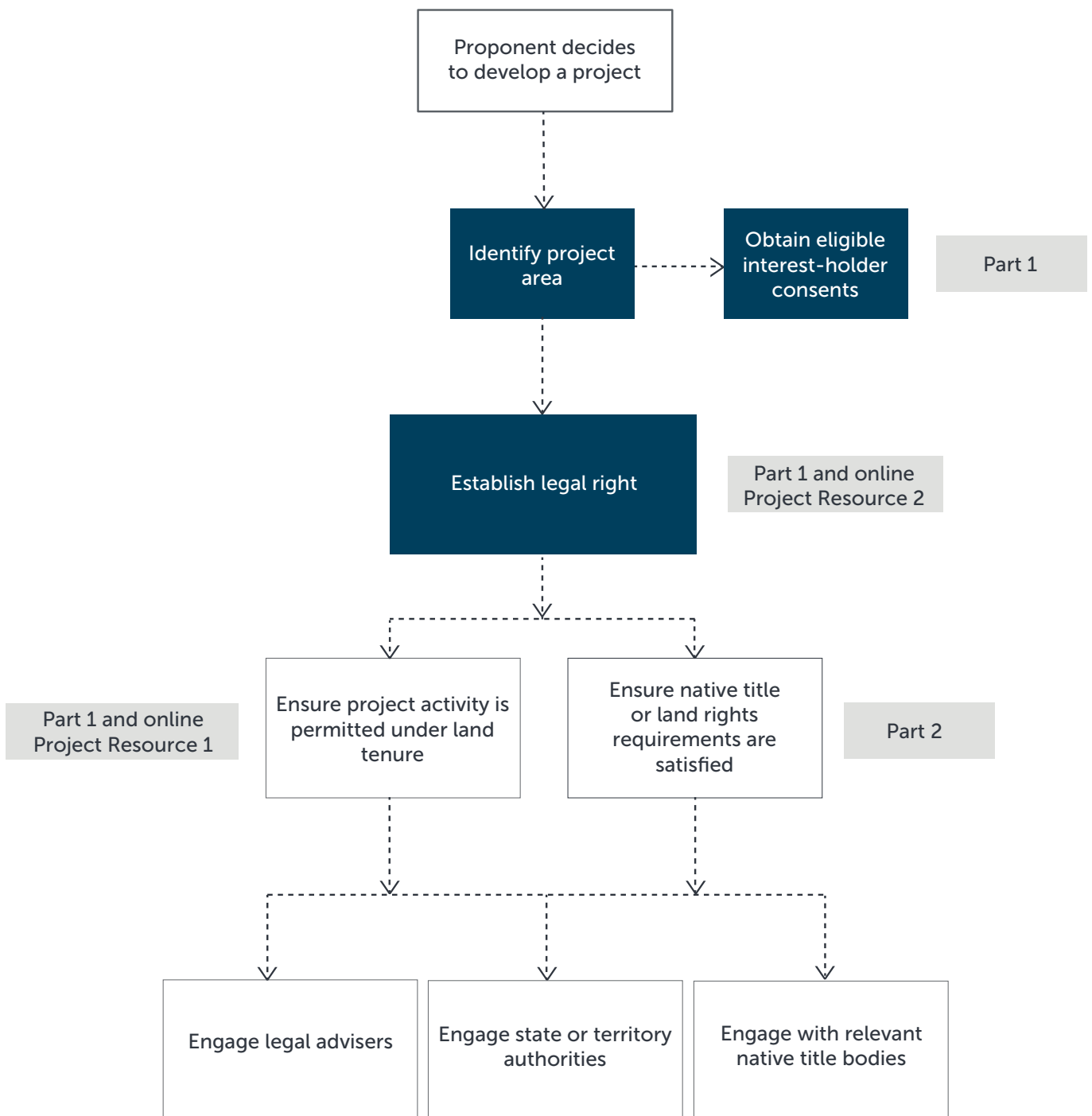
Guidance scope

This guidance does not in any way replace or supersede the legal requirements of the Emissions Reduction Fund legislation, the Native Title Act or any state or territory legislation. It does not outline all legislative requirements, such as eligible project methods to run a project, how to apply to register a project, and run a project.

⁴ <http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Planning-a-project/Legal-right>



Figure 2: Legal right considerations and where to find information in this document





What is the Emissions Reduction Fund?

The Emissions Reduction Fund is a voluntary scheme that credits organisations and individuals (project proponents) for adopting new practices and technologies to reduce greenhouse gas emissions. It is administered by the Clean Energy Regulator and implemented under the CFI Act and associated legislation, including the Carbon Credits (Carbon Farming Initiative) Rule 2015⁵ (the CFI Rule), the Carbon Credits (Carbon Farming Initiative) Regulations 2011⁶, and various project methodology determinations.

The Clean Energy Regulator is responsible for administering all aspects of the Emissions Reduction Fund, including assessing whether a project meets the eligibility criteria through the project registration process, and any crediting of ACCUs.

The Department of the Environment and Energy is responsible for policy development and oversight of the scheme, including development of project methods and consultation on any proposed changes to the Emissions Reduction Fund legislation.

The Emissions Reduction Assurance Committee is an independent, expert committee, which assesses whether methods meet the requirements of the Emissions Reduction Fund and provides advice to the Minister for the Environment and Energy. The Minister decides whether to make a project method, following endorsement by the Emissions Reduction Assurance Committee.

Other people and entities also have roles and responsibilities under the Emissions Reduction Fund. For example, project proponents are responsible for meeting various obligations under the CFI Act, including notifying the Clean Energy Regulator if they cease to hold the legal right. Agents, aggregators and other service providers may assist project proponents to meet these obligations. However, under the CFI Act, these obligations are the responsibility of the project proponent.

Further information on the Emissions Reduction Fund can be found on the Clean Energy Regulator's website⁷ and the Department of the Environment and Energy's website⁸.

5 <https://www.legislation.gov.au/Series/F2015L00156>

6 <https://www.legislation.gov.au/Series/F2011L02583>

7 <http://www.cleanenergyregulator.gov.au/ERF/About-the-Emissions-Reduction-Fund>

8 <http://www.environment.gov.au/climate-change/government/emissions-reduction-fund>



PART 1

**Legal obligations and consent
requirements for Emissions
Reduction Fund projects**

Part 1: Legal obligations and consent requirements for Emissions Reduction Fund projects

Part one of the guidance explores some of the requirements in the CFI Act for registering and running an Emissions Reduction Fund project, including legal obligations and consent requirements. It provides information about:

- › project proponents
- › legal right
- › eligible interest-holder consent
- › regulatory approvals, and
- › carbon abatement contracts.

Project proponents

One of the requirements for a project to be registered as an Emissions Reduction Fund project is that the applicant is the 'project proponent' for the project. This term is defined in section 5 of the CFI Act as the person who:

- a) is responsible for carrying out the project, and
- b) has the legal right to carry out the project.

It is a project proponent's responsibility to ensure they have the legal right to carry out an Emissions Reduction Fund project for the life of the project, and have the right to receive ACCUs for reducing carbon emissions through project activities. The life of the project will be the duration of the crediting period for an area-based emissions avoidance project, and the duration of the permanence period for a sequestration project.

Permanence period

Project proponents of sequestration projects must consider the permanence period of their project, which may be 25 or 100 years. The CFI Act imposes obligations to ensure that carbon stored by a project is maintained for the project's permanence period.

Legal right

Legal right to carry out an Emissions Reduction Fund project means:

- › you have the right to carry out the project activities (including all applicable methodology determination requirements) on the sites included in the project area, and
- › you have the lawful and exclusive right to be issued all ACCUs that may be credited as a result of the project activities.

The processes for securing legal right will differ depending on the individual circumstances of each project. Establishing legal right will generally involve establishing who has the legal interest in the land upon which the project will be carried out and whether that interest confers a right to undertake project activities. Some examples of land legal interest considerations include:

Pastoral lease

- › A person who holds a pastoral lease may hold the legal right to carry out the project where the project activity is permitted under the terms of their lease, or the lessee has obtained any necessary approvals to undertake the activity, and all other relevant legislated requirements have been met. They may be able to assign this legal right to another person. However, if the pastoral lessee is prohibited by state and territory law or the terms of their lease from carrying out the project activity, they do not hold the legal right to carry out the project and cannot assign that right to another person.
- › An overview of relevant state and territory requirements are set out on the Clean Energy Regulator's website in online Project Resource 1: State and territory land law and land rights law.
- › Project proponents will also need to ensure that requirements under the Native Title Act are complied with (as described in Part 2: Native Title and the Emissions Reduction Fund).

Exclusive possession native title land

- › If the project area is on exclusive possession native title land, it is possible for the registered native title body corporate to be legally 'deemed' to be the proponent for the project. For this to apply, no person (other than a body politic, the common law holders or the registered native title body corporate for the project area) must have the legal right to carry out the project and hold the applicable carbon sequestration right. See subsection 46(1) and sections 48 to 51 of the CFI Act.
- › Aboriginal corporations or third party service providers may also obtain legal right to carry out a project, generally through written agreements with the registered native title body corporate when it is the project proponent.

Non-exclusive possession native title land

- › If the project area is non-exclusive possession native title land and the registered native title body corporate has the legal right to carry out the project and holds the applicable carbon sequestration right, then the registered native title body corporate for the project area is deemed to be the project proponent. See subsection 46(2) and sections 48 to 51 of the CFI Act.
- › Such legal right may be conferred on other entities, as with exclusive possession native title land.

Freehold land

- › If a project proponent is a freehold owner of the land, establishing legal right and registering an Emissions Reduction Fund project should generally be straightforward. However, a freehold land owner will need to comply with the requirements to obtain eligible interest-holder consent and regulatory approvals where applicable.

Aboriginal land rights

- › Aboriginal land rights are rights afforded to traditional owners under state or territory legislation. These rights must be considered by anybody planning a project on Aboriginal land (referred to in the CFI Act as 'land rights land'). Projects planned to be carried out on Aboriginal land must comply with any requirements under the governing legislation. In some cases, Aboriginal land rights are similar to freehold, and give landholders the legal right to conduct Emissions Reduction Fund projects.

While there is a requirement for proponents to have the legal right, the Clean Energy Regulator is not responsible for conclusively determining which party has the legal right. The Clean Energy Regulator's assessment at the time of project registration (assessing that a person has legal right to carry out a project) is an administrative assessment based on information provided to it. The Clean Energy Regulator and its processes do not create legal right, nor do they certify that it exists. The Clean Energy Regulator's registration of a project does not authorise the carrying out of project activities.

In the event of conflicting legal right claims, a resolution may be reached as a result of mutual negotiation leading to a commercial agreement. If this is not possible, legal right may need to be determined by a court or tribunal.

If a project proponent loses the legal right to carry out the project at any stage, they must take steps to regain it. If this is not possible, the project proponent needs to notify the Clean Energy Regulator within 90 days of losing legal right that they have ceased to hold the legal right to undertake the project. At that point, they may apply to revoke the project registration, transfer the project to the person who does hold the legal right to conduct it, or remove parts of the project area where they have lost legal right. The Clean Energy Regulator can only issue ACCUs to the person who is assessed to hold the legal right to carry out the project.

Online Project Resource 2: How does a proponent demonstrate legal right?—provides examples of how a project proponent can demonstrate legal obligations have been met to the Clean Energy Regulator when registering and undertaking an Emissions Reduction Fund project.

Further information about legal right is available on the Clean Energy Regulator website⁹.

⁹ www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Planning-a-project Legal-right.



Legal right risk mitigation

Project legal right requirements vary significantly, depending on the circumstances of each individual project. When obtaining or confirming legal right, project proponents must consider the types of land tenure, native title rights, pre-existing agreements, parties with co-legal right, resource tenements, and other matters affecting the project land or assets.

Lack of clarity regarding legal right requirements to conduct a project introduces a risk that the proponent could lose legal right or have the legal right challenged. This may arise from contesting parties, government, or as a result of a failure to address native title considerations where a future acts regime under the Native Title Act is triggered (see Part 2: Native title and the Emissions Reduction Fund). It also raises the risk that the proponent may be found to never have had the legal right to conduct the project and therefore may have made a false or misleading claim about having legal right to conduct the project.

To mitigate this risk and improve commercial certainty, proponents should undertake due diligence and are encouraged to enter into legally binding agreements with all relevant parties that set out the rights to conduct project activities and deal with ownership of the associated carbon rights. This may take the form of an Indigenous land use agreement for land with native title interests and rights, or private contracts or agreements with other relevant parties. Increased engagement and formalisation of agreements with relevant parties reduces the risk of a proponent losing legal right or having legal right challenged. The lasting nature of these agreements will help proponents secure their legal right to continue conducting their project into the future. Table 1 below provides examples of low and high risk practices when establishing legal right.

Table 1: Low and high risk business practices when obtaining legal right

Low risk legal right practices	High risk legal right practices
<ul style="list-style-type: none"> › Enter into an agreement with Indigenous stakeholders such as an Indigenous land use agreement with native title holders and registered native title claimants. › Enter into agreements or contracts with other parties that have legal right claims. › Contact state or territory land departments to confirm land tenure permitted activities › Obtain security of tenure for the duration of the permanence period for the project. 	<ul style="list-style-type: none"> › Minimal upfront engagement with native title groups and other parties with interests in the land. › Limited consideration of land tenure permitted activities.



Eligible interest-holder consent

One or more people may hold an ‘eligible interest’ in the land where a project is carried out. Eligible interest-holders include:

- › people who hold carbon sequestration rights
- › landholders
- › banks or mortgagees
- › state and territory Crown Lands Ministers, and
- › if the project area is on native title land, any registered native title bodies corporate.

Legal right and eligible interest-holder consent are separate requirements under the CFI Act. The same person or entity might need to provide project proponents with legal right as well as eligible interest-holder consent. In such cases, obtaining eligible interest-holder consent can support and reinforce legal right.

Sections 43 to 45A of the CFI Act and section 34 of the CFI Rule set out the requirements for parties to hold eligible interest-holder consent.

Conditionally registered projects

Eligible interest-holder consents are required for all area-based Emissions Reduction Fund projects. This includes all projects carried out under sequestration methodologies and area-based emissions avoidance methodologies, such as the savanna burning emissions avoidance method.

Projects can be conditionally registered prior to obtaining all eligible interest-holder consents provided that the project proponent has the legal right to run the project. However, the condition cannot be lifted and projects cannot be credited until all eligible interest-holder consents have been received, which must be before the end of the first reporting period.

Eligible interest-holder consent cannot be withdrawn after it has been provided to the Clean Energy Regulator and the project has been registered or the consent condition has been removed or met—therefore, it is critical that those providing consent know what is being agreed to.

Eligible interest-holder consents must be provided to the Clean Energy Regulator using the eligible interest-holder consent form unless the consent is already set out in an Indigenous land use agreement (that is made and registered under the Native Title Act). If all consents are not obtained before the project is registered, the project will be registered on the condition that all outstanding consents are obtained before the end of the project’s first reporting period. Until all consents have been obtained, projects will not be credited ACCUs.

If the project’s registration is conditional upon the proponent obtaining consents from all eligible interest-holders, and the Clean Energy Regulator is later satisfied that all such consents have been obtained, the Clean Energy Regulator will remove the condition. Proponents are not required to obtain consents from eligible interest-holders where the eligible interest arises after the project has been registered unconditionally or the first ACCUs have been issued.

A project’s unconditional registration is not conclusive where material misrepresentations have been made to the Clean Energy Regulator whilst providing eligible interest-holder consent.



Best practice: eligible interest-holder consent

Eligible interest-holder consent may be provided under an Indigenous land use agreement or in the approved form provided by the Clean Energy Regulator (whether on its own or as an attachment to some other agreed commercial arrangement). See Part 2: Native Title and the Emissions Reduction Fund.

It is critical that those providing consent know what is being agreed to, and, where consent is being provided by native title holders, the requirements of the Native Title Act are taken into account in determining the process for consent.

To mitigate the risk of projects failing due to lack of consent, it is in the best interests of proponents to ensure eligible interest-holders are engaged prior to project application. This will also assist proponents to allocate sufficient time and cost to obtaining consents.

Best practice: free, prior and informed consent

Proponents should consider the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples¹⁰, including in particular the principle of free, prior and informed consent, when running a project on land subject to native title.

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 status and find themselves subject to other legal action.

If a proponent fails to obtain all eligible interest-holder consents before the end of the first reporting period (a maximum of two years for projects under emissions avoidance methods, and five years for projects under sequestration methods), the Clean Energy Regulator may revoke the project for failing to meet the conditions of its declaration. Projects may also fail to satisfy contractual obligations since they cannot receive ACCUs without all eligible interest-holder consents. Proponents should notify the Clean Energy Regulator as early as possible if there is a likelihood eligible interest-holder consents will not be obtained before the end of the first reporting period.

Should a project be revoked, either by the proponent or the Clean Energy Regulator, there may be implications for the newness requirements and carbon emission baselines of future Emissions Reduction Fund projects wishing to run on the same area. Future projects may be prevented from running on the same land or the amount of ACCUs that can be issued to them may be negatively affected. As such, it is critical that proponents consult early with all eligible interest-holders to ensure all consents will be received on time. Undertaking best practice consultation will decrease the likelihood that a project will have difficulty obtaining timely eligible interest-holder consents.

¹⁰ <https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-people>



Differences between legal right and eligible interest-holder consent

The project proponent's legal right to carry out the project must be established and demonstrated before a project can be registered. The legal right to carry out the project must be maintained for the duration of the life of the project. If legal right is lost, the Clean Energy Regulator may revoke the project and, in the case of a sequestration project, impose a requirement to relinquish ACCUs that have been issued and a carbon maintenance obligation. Before registering a project, the Clean Energy Regulator will require project proponents to maintain evidence that they either hold the legal right or have acquired legal right through a written agreement (such as a commercial contract).

Eligible interest-holder consents are only provided once for the project (except when varying the project area), while legal right needs to be maintained throughout the life of the project. There may be some overlap between entities that will need to be engaged to demonstrate legal right and those that need to provide eligible interest-holder consent—for example, a registered lessee. Figure 3 in this document shows a comparison between legal right and eligible interest-holder consent.

Regulatory approvals

Regulatory approvals or permits may also be required to undertake an Emissions Reduction Fund project.

Regulatory approvals are licences, permits or approvals (however described) that are required under a law of the Commonwealth, a state or a territory that relate to land use, development, the environment, or water. A project proponent must obtain these from the relevant local, state, territory, or Commonwealth authorities before commencing a project. Regulatory approvals can support and reinforce legal right.

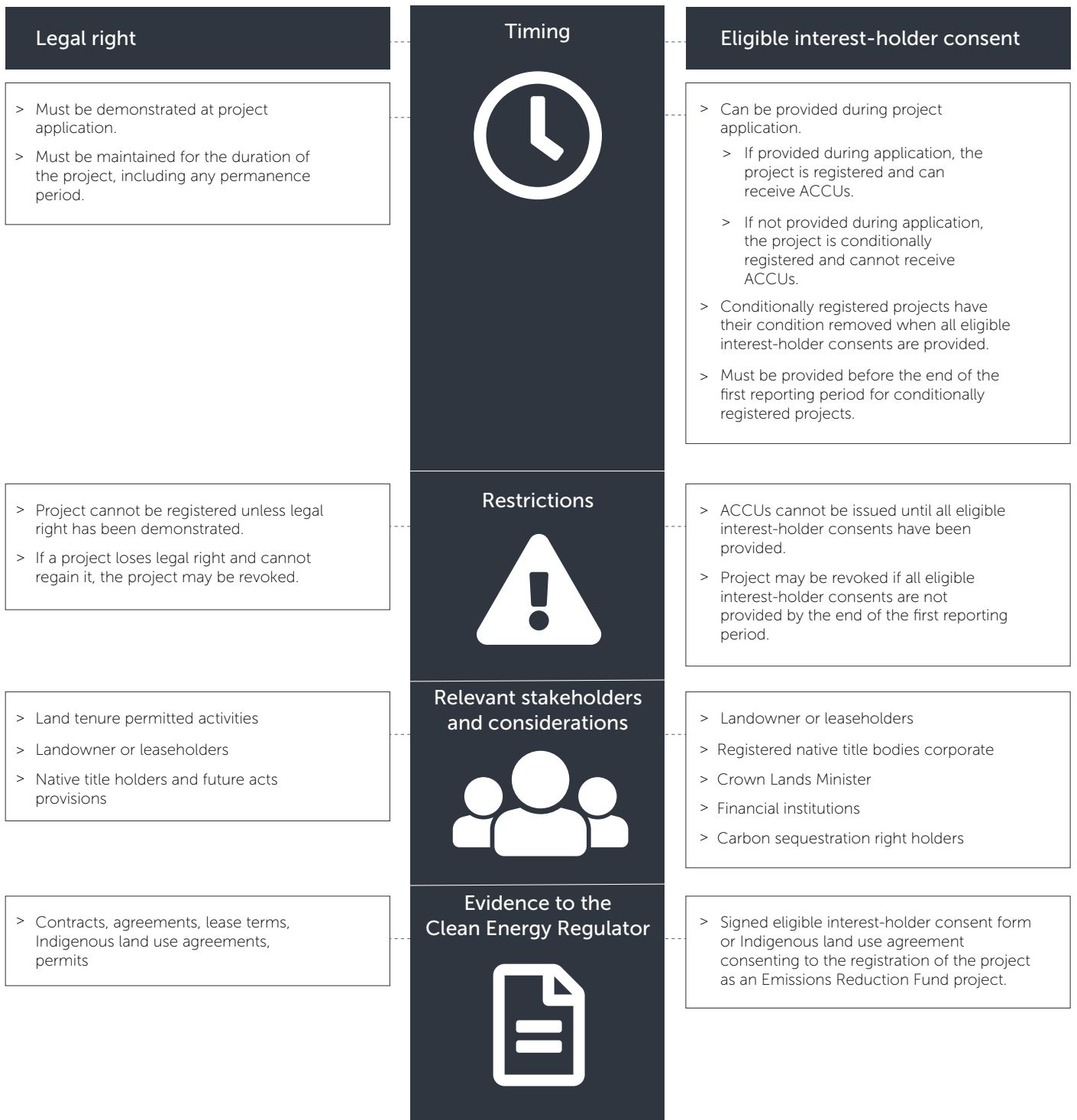
A project can be registered on the condition that all regulatory approvals are obtained before the end of the first reporting period for the project. However, the Clean Energy Regulator cannot issue any ACCUs for the project while any regulatory approvals are outstanding, even where the project proponent has the legal right to carry out the project.

Certain laws may apply differently to projects depending on the design, size or location of the project. For example, state planning approval requirements might vary from one local government area to another and other requirements or constraints may be site-specific. Environmental approval regulations often include criteria for determining whether an approval is required—some contain detailed exemption provisions that may negate this requirement.

Project proponents should obtain independent legal advice and speak to the relevant government agencies and departments regarding the regulatory approvals required for a specific project. They need to demonstrate to the Clean Energy Regulator that they have obtained all relevant regulatory approvals, which may include providing copies of relevant documents, or correspondence with state or territory authorities if approvals are not required in the specific circumstances of their project.

Further details about local, state and territory land use approvals (and contact details) are available in online Project Resource 1: State and territory land law and land rights law.

Figure 3: Legal right and eligible interest-holder consent for area-based projects





Carbon abatement contracts

If a project proponent has a carbon abatement contract with the Australian Government as the result of a successful bid at an Emissions Reduction Fund auction, they must deliver ACCUs to the Clean Energy Regulator according to the delivery schedule obligations agreed in their contract. While contracts relate to a specific Emissions Reduction Fund project, ACCUs delivered under the contract may be sourced from any project.

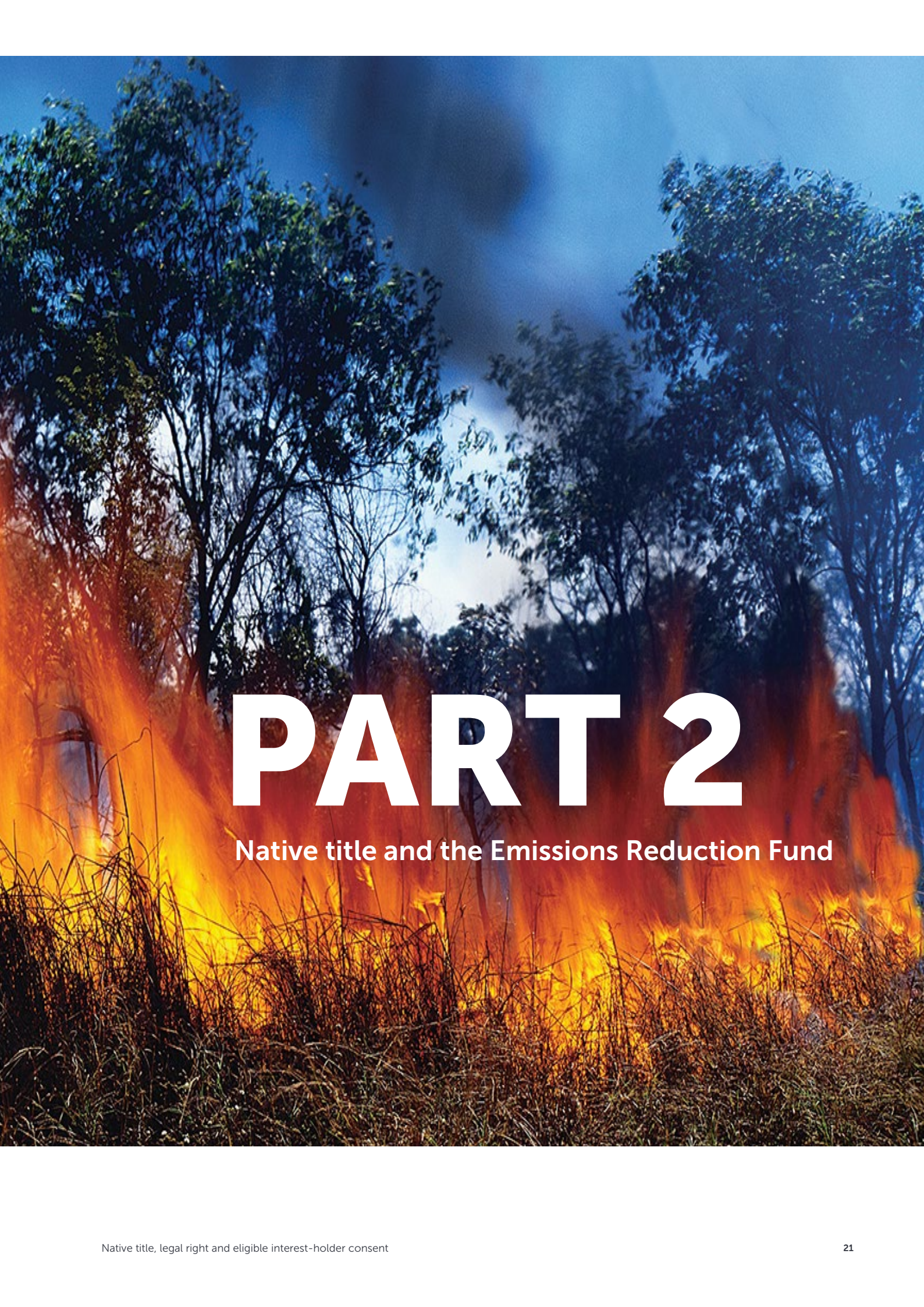
The carbon abatement contract may include 'conditions precedent'. Conditions precedent are events or circumstances that must be fulfilled before the delivery and payment obligations of the contract come into force.

Conditions precedent can be used to give time to establish third party agreements, obtain regulatory approvals and eligible interest-holder consents, and satisfy other conditions that are required to carry out a project. Contracts associated with projects that have not received all relevant approvals or consents at the time of registration will have conditions precedent imposed.

While contracts are affected by eligibility requirements of Emissions Reduction Fund projects they are not a focus of this guidance. Further information about contracts is available on the Clean Energy Regulator website¹¹.

¹¹ <http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Step-2-Contracts-and-auctions/understanding-carbon-abatement-contracts>





PART 2

Native title and the Emissions Reduction Fund

Part 2: Native title and the Emissions Reduction Fund

Indigenous Australians have a strong and continuous connection to country. Australian law recognises Indigenous Australians' traditional rights and interests in land and waters through the Native Title Act. Figure 4 in this document shows the native title determinations and registered claims over Australia as at 31 May 2018.

Emissions Reduction Fund projects on land subject to native title law must consider native title holder interests, particularly with regard to satisfying legal right and eligible interest-holder consent requirements for the project.

If project proponents (or their agents) undertake project activities that affect native title rights and interests, there will be obligations under the Native Title Act that must be satisfied. Failure to take appropriate action could affect the legal right to undertake a project.

This part of the guidance provides an overview of native title, how it interacts with Emissions Reduction Fund project requirements, and how project proponents can determine if projects will occur on native title land.

Native title

Native title is the bundle of rights and interests in land and waters that Aboriginal and/or Torres Strait Islander people can hold under traditional laws and customs. Native title may exist over an area as common law even if native title rights have not been formally recognised (or determined) by a court.

The process for recognising native title rights and interests is set out in the Native Title Act. In summary, members of a native title claim group seek a decision from a court that native title exists so their rights and interests are formally recognised under Australian Law. This is called a native title determination. A determination is a decision by the Federal Court (or the High Court on appeal) that native title either does or does not exist in relation to a particular area of land or waters.

The Native Title Act requires traditional owners to prove they have maintained a traditional connection to their country since sovereignty. The native title recognition process can take a long time, sometimes up to 15 years or more. This is because it involves a number of different people and processes.

If the Federal Court determines native title rights and interests exist, the group must set up a prescribed body corporate to hold the rights and interests, as an agent or on trust, for the group. Once registered, this body corporate is termed a registered native title body corporate.

A native title determination must set out the relationship between native title rights and interests and any other interests in the determination area, including whether the native title holder holds exclusive or non-exclusive rights over the land. For more information, see section 225 of the Native Title Act.

In summary:

- › Exclusive possession native title rights (sometimes called 'exclusive native title rights') are the exclusive rights to possession, use and enjoyment of the land, which includes the rights to control access to the land.
- › Non-exclusive native title rights and interests over a particular area are articulated in the native title determination and can include rights to live or camp on the land, hunt, fish, gather, perform traditional ceremonies, and maintain sacred sites. Non-exclusive native title rights exist alongside other non-native title rights and interests in the relevant land and waters (e.g. the right to hunt is a non-exclusive right that can coexist with certain other rights, such as the rights under a pastoral lease).

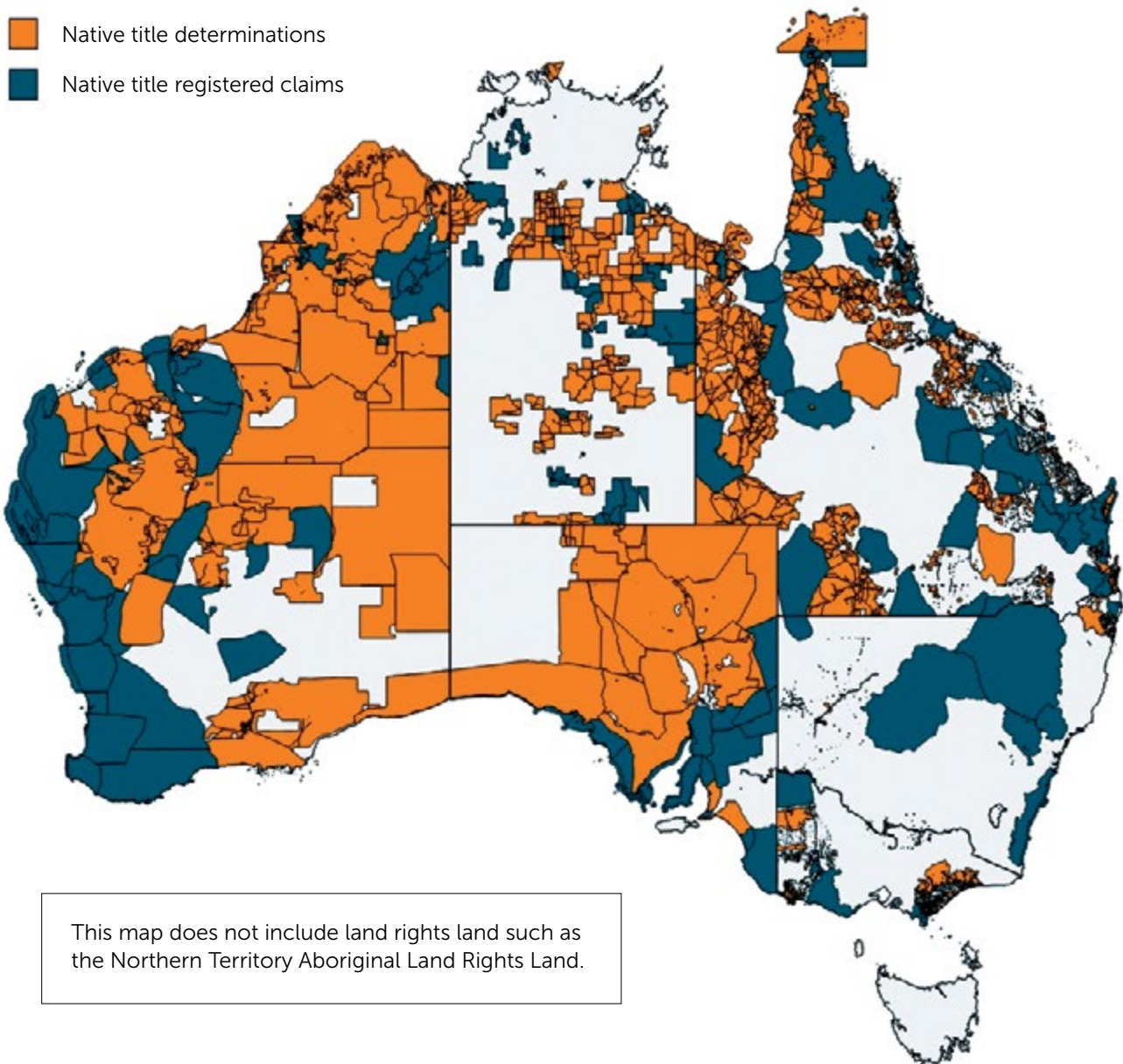
In some circumstances, the Federal Court may determine that native title does not exist. There may be a number of reasons for this outcome, such as where native title claimants have not been able to establish an ongoing connection to country.

In other cases, the Federal Court may determine that native title has been extinguished over particular areas of land. This occurs when native title rights and interests cannot be recognised because things have happened in the past that have made recognition not possible. In some cases, the whole bundle of native rights is extinguished, but in other cases, only some of the native title rights are extinguished.

For example, a grant of freehold over an area of land extinguishes all native title rights, but the grant of a pastoral lease may only extinguish some native title rights. Whether native title rights continue to exist will depend on the history of land tenure and use of the area. The native title determination will set out these native title rights and interests in the determination area.



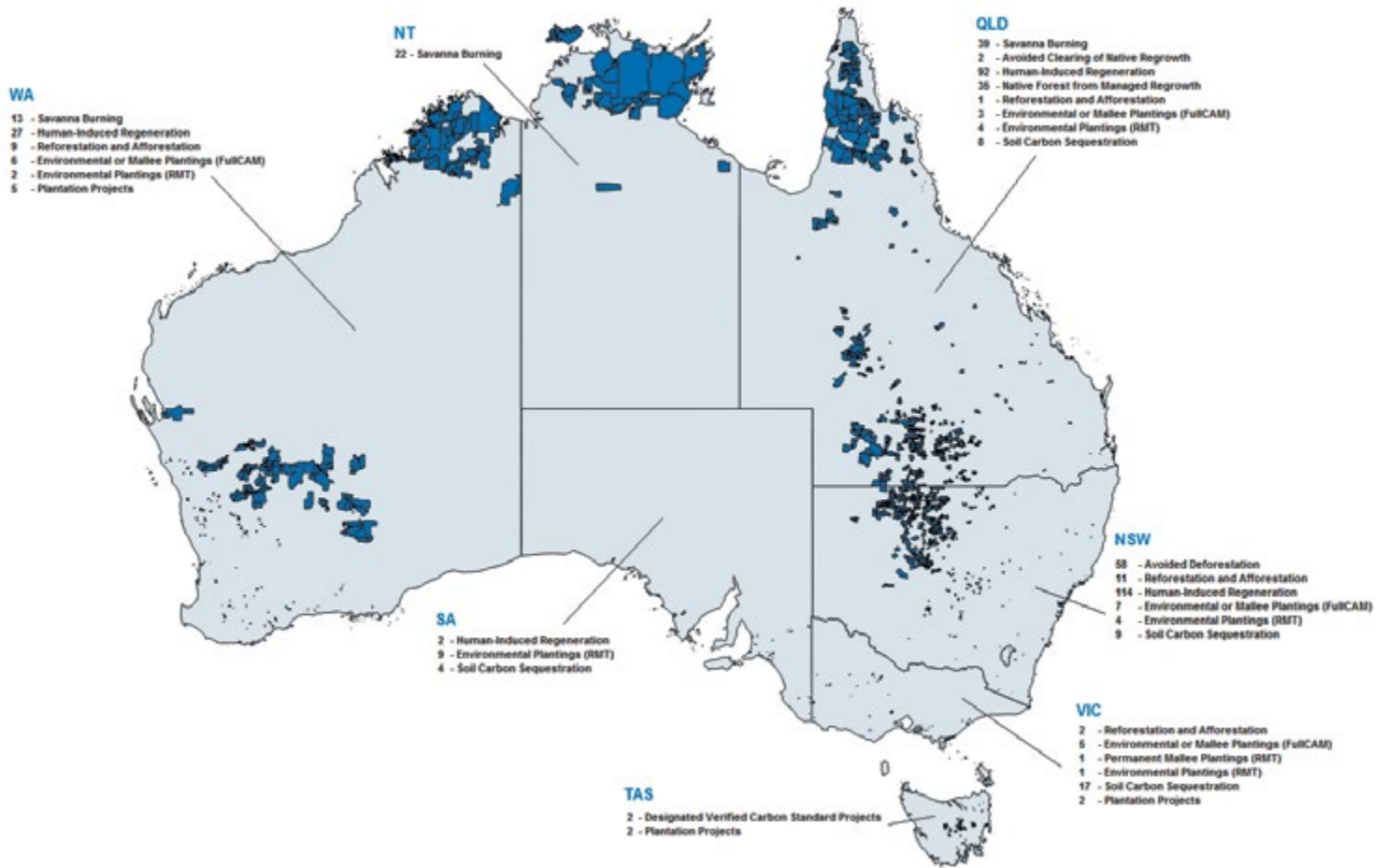
Figure 4: Status of registered native title claims and determinations as of 31 May 2018¹².



¹² Source: <http://www.nntt.gov.au/assistance/Geospatial/Pages/Spatial-aata.aspx>



Figure 5: Area-based Emissions Reduction Fund projects currently in each jurisdiction as of 31 May 2018¹³.



13 Source: <http://www.nntt.gov.au/assistance/Geospatial/Pages/Spatial-aata.aspx>

Claimants and native title holders

In the context of native title, the term 'claimants' refers to individuals, groups or communities who have made a claim for native title to the Federal Court and that claim has been accepted for registration by the National Native Title Tribunal. The term 'determined native title holders' is used to refer to individuals, groups or communities whose native title rights and interests have been recognised by a native title determination.

Legally, there are important distinctions between claimants and native title holders under the Native Title Act. However, both registered claimants and native title holders may have procedural rights under the Native Title Act for acts that affect native title. When engaging with native title claimants, it is important to recognise that a native title determination does not create new native title rights, but confirms the existence or extent of impingement of existing native title rights. It is not the case that native title claimants do not have native title rights—rather, these rights have not yet been arbitrated on by a court.

Unclaimed native title land

Land which does not have a current native title determination or registered claim has not yet had native title rights considered or recognised by a court. However, this does not mean that native title does not exist in the unclaimed area. Proponents running a project on unclaimed land should still be aware of native title and actions may be required in order to comply with the Native Title Act including particular steps to identify the relevant native title holder.

In addition to land the subject of a registered native title claim or determination, the future acts regime applies on land without a current claim or determination, since a future act could impact the native title rights and interests of any future native title holders for the area. Proponents doing a future act must ensure all requirements under the Native Title Act are satisfied.

Native title rights typically co-exist alongside the rights of others over the same area, so the making of a determination should not usually affect a project's legal right. However, proponents may consider joining as a party to overlapping native title claim proceedings in the Federal Court to ensure any determination takes the project into account and the project is recognised as an existing interest in any determination that is made.

Identifying native title rights and interests over a project area

As shown in Figure 4, a large proportion of Australia is subject to registered native title claims or determinations. The National Native Title Tribunal can assist in identifying whether a project area intersects with native title claims or determinations. Even if there is no current registered claim or determination, a claim can still be brought forward in the future.

The National Native Title Tribunal provides geospatial data and a mapping tool¹⁴ (Native Title Vision) to assist people to identify where there are native title claims and determinations. Copies of native title determinations are available by searching the Federal Court of Australia Database or via the Native Title Vision mapping tool.

If there is a native title determination or claim over a proposed project area, it is important to read the Native Title Register extracts and attachments which provide information on the area and native title rights and interests over the land. For example, claims and determinations may exclude lands and waters covered by certain leases, which may affect whether any registered native title body corporate is or may be an eligible interest-holder. This information is contained in the schedules of the native title determination, the extract from the Native Title Register, and the area maps provided as attachments to the Register.

Online Project Resource 3: Identifying native title land provides instructions on using the Native Title Vision mapping tool and finding native title determination and registered claim extracts.

Where the project is on land subject to native title, the project proponent should also consult with relevant native title representative bodies (such as Indigenous land councils) for the project area to understand who the relevant native title holders are and what native title processes may need to be complied with.

14 <http://www.nntt.gov.au/assistance/Geospatial/Pages/default.aspx>

Consideration of future acts

The future act provisions set out in Part 2, Division 3 of the Native Title Act are a set of legal protections for native title holders and registered claimants on land subject to native title.

A 'future act' is a proposed activity on land or waters that affects native title. The term 'future act' is defined in section 233 of the Native Title Act and must be read in light of the definitions of 'act' and 'act affecting native title' at sections 226 and 227. Examples of future acts include:

- › the granting of a new interest in land such as a new leasehold interest or a mining tenement (including a mining claim, lease or licence),
- › varying the terms of a pastoral lease to confer new rights on the holder of the lease (including to expand the purpose of the lease), and
- › the compulsory acquisition of land where such actions affect native title rights.

The future acts regime establishes procedures to be followed so that a future act is done validly. It applies to all land where native title exists. This includes land with existing registered native title claims or determinations. It may also include land with no current claim or determination, but where native title is subsequently determined to exist.

Best practice: the future acts regime

Anyone wishing to conduct an Emissions Reduction Fund project on land where native title may exist—regardless of whether or not a native title claim has been made or determined by the Federal Court—should be aware of the future acts regime. Legal right may be invalid if a project proponent does not comply with the future acts regime in the Native Title Act.

Subsections 24AA(3) and 24AA(4) of the Native Title Act list methods by which future acts can be legally validated. If a future act is not validated under one of these provisions, it will be invalid.

- › Subsection 24AA(3) allows any future act to be validated by the creation of an Indigenous land use agreement in which all relevant native title groups consent to the doing of the future act. This includes agreeing to any associated extinguishment of native title rights and potential compensation.
- › Subsection 24AA(4) lists types of future acts that can be validated under the Native Title Act. If a future act satisfies one of these provisions then it will be valid as long as the procedural rights under the relevant section are met. For example, a lease renewal future act can be validated under subdivision I (renewals and extensions etc.) as long as all relevant criteria in the subdivision are met.

The future acts regime protects future dealings in the land while safeguarding the rights and interests of native title holders. The Native Title Act may grant registered native title claimants and native title holders procedural rights that entitle them to comment, be consulted, object to, or enter into negotiations about some future acts. The extent of procedural rights will vary depending on the type of act, and not all future acts are subject to negotiation.

More information about future acts is available at the National Native Title Tribunal website¹⁵.

State and territory land departments may be able to provide more specific information on whether project activities (including approvals related to project activities) are likely to constitute a future act (for contact details, see online Project Resource 1: State and territory land law and summary of land rights law on the Clean Energy Regulator's website).

Relevant native title representative bodies, which can include Indigenous land councils, can also assist with information if project proponents have uncertainties regarding the rights of native title holders, registered claimants, or future native title claimants, and whether an activity constitutes a future act. The National Native Title Tribunal can assist proponents by facilitating and mediating discussions with relevant bodies (such as registered native title bodies corporate) and providing a central point of contact.

¹⁵ <http://www.nntt.gov.au/futureacts>

Best practice: Indigenous land use agreements

Where it is uncertain if a project activity or approval related to a project activity is a future act, project proponents may choose to manage the associated risk by entering into an Indigenous land use agreement. Indigenous land use agreements can be registered even where no current claim or determination exists.

The National Native Title Tribunal can provide further information on how to set up Indigenous land use agreements.

Indigenous land use agreements

An Indigenous land use agreement is a voluntary agreement between native title groups and others about the use of land or waters. These agreements allow people to negotiate flexible agreements to suit their particular circumstances and are often used to consent to the doing of future acts over a particular area. They can exist regardless of whether or not there is a registered native title claim over the area or native title has been determined to exist. They can be entered into on their own or as part of a native title determination.

When registered by the Native Title Registrar, an Indigenous land use agreement binds not only the native title parties to the agreement, but all persons holding native title (both current and future) in the area covered by the agreement—a property unique to Indigenous land use agreements. For this reason, project proponents and native title groups may wish to enter into an Indigenous land use agreement setting out their rights and responsibilities for a project area.

The enduring and flexible nature of Indigenous land use agreements makes them useful for proponents seeking to run a project. Prior to beginning a project, a proponent can enter into an Indigenous land use agreement with native title groups that sets out the rights to run the project activity and the associated carbon rights. Such an agreement legally protects the proponent from any future changes to native title on the land, while also ensuring native title holders can negotiate or be consulted about activities on the land. They may be particularly helpful when establishing legal right for sequestration projects for the duration of the project's permanence period.

Setting up an Indigenous land use agreement for projects is recommended, but will not always be legally required. In some cases, requirements under the CFI Act (legal right, eligible interest-holder consent) and the Native Title Act (validation of certain future acts) may be satisfied using other mechanisms. However, an Indigenous land use agreement will provide the strongest legal certainty to project proponents and native title claimants or holders. It can satisfy multiple requirements simultaneously, including the consent to future acts, demonstration of project legal right, and attainment of eligible interest-holder consent from determined native title holders.

Guidance on creating an Indigenous land use agreement is provided by the National Native Title Tribunal¹⁶. The Tribunal can assist all parties with the process by providing general advice, helping to identify appropriate native title groups, outlining negotiation options, and more.

Subdivisions B to E, Division 3, Part 2 of the Native Title Act set out the requirements for Indigenous land use agreements. Some non-confidential information about specific Indigenous land use agreements is published on the Register of Indigenous land use agreements¹⁷.

¹⁶ <http://www.nntt.gov.au/>

¹⁷ <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>

Native title, credit relinquishment and carbon maintenance obligations

Native title holders and registered claimants either participating in a sequestration project, or with a connection to land that is part of an existing or proposed sequestration project, should be aware of the potential impact of carbon maintenance obligations. A carbon maintenance obligation is designed to prevent the destruction of carbon stores that have been credited under the Emissions Reduction Fund. It does not prevent land from being used for productive purposes, so long as the carbon on the land when the obligation applied is maintained.

Relinquishment of Australian carbon credit units

If there is a significant decline in the carbon stored in the project area, the Clean Energy Regulator may require the project proponent to first relinquish some or all ACCUs that have been issued for the project. This may occur where the decline in carbon stores occurs for reasons other than natural disturbances, reasonable actions to reduce the risk of bushfire, or the conduct of a person that was not within the reasonable control of the project proponent. See section 90 of the CFI Act.

If a fire, other natural disturbance, or conduct of a person not within the reasonable control of the project proponent causes a significant decline in the carbon stored in the project area, the project proponent must undertake steps to mitigate the effect of the disturbance or conduct to allow the carbon stock to return to previously reported values. If the project proponent has not taken such steps, the Clean Energy Regulator may require the project proponent to return or relinquish any or all ACCUs that have been issued for the project. See section 91 of the CFI Act.

Relinquishment obligations may also be imposed by the Clean Energy Regulator where ACCUs have been issued on the basis of information provided that was false or misleading in a material particular, or where a sequestration project is unilaterally revoked by the Clean Energy Regulator. See sections 88 and 89 of the CFI Act.

Carbon maintenance obligation

If relinquishment obligations are not met (or the Clean Energy Regulator is satisfied that they are unlikely to be met), a carbon maintenance obligation may be imposed in relation to the whole or a part of the project area of a sequestration project. If the Clean Energy Regulator decides to impose a carbon maintenance obligation, it will take steps to notify the project proponent, eligible interest-holders and the relevant land registration official of the obligation. See section 97 of the CFI Act.

There are two obligations that arise after a carbon maintenance obligation has been imposed:

- › A person (regardless of whether they were involved in the project) must not engage in conduct that reduces or is likely to reduce carbon stores below the level that existed when the carbon maintenance obligation was imposed. The exception to this obligation is where an activity which reduces carbon is listed as a permitted carbon activity.
- › If there is a reduction of carbon stores below the level when the carbon maintenance obligation was imposed, the owner or occupier of the land must take all reasonable steps to ensure the carbon level in the carbon stored at the time the obligation was placed on the land is not reduced below this level.

Failure to meet the above two obligations may result in a court imposing a financial penalty. See sections 97(9) to (12) of the CFI Act. The Clean Energy Regulator may also seek injunctions to seek observance or prevent breaches of these obligations.

Importantly, these obligations have the potential to impose requirements on native title holders and claimants who are not the project proponent for the project.

A carbon maintenance obligation lapses upon the first to occur:

- › Full payment of all penalties payable for failure to relinquish ACCUs.
- › The expiry of the project's permanence period starting from when ACCUs were first issued for the project.
- › Expiry of the project's permanence period starting from when land was last added to the project area. See section 97(14) of the CFI Act.

The carbon maintenance obligation will be removed if all the ACCUs issued for the project are returned to the Clean Energy Regulator and the project land is not part of any sequestration project. See section 99 of the CFI Act.

Carbon maintenance obligations and native title

As previously mentioned in this guidance, registered native title bodies corporate need to grant eligible interest-holder consent and potentially legal right for the project to run. In the case of sequestration projects, they are recognising and accepting the requirement that carbon stocks are maintained for the 25 year or 100 year permanence period.

However, before a carbon maintenance obligation is imposed, the Clean Energy Regulator will review whether the obligation could affect native title and be a future act. This will depend on the circumstances of each case and whether the exercise of native title rights is recognised in the carbon maintenance obligation as a permitted carbon activity.

The Clean Energy Regulator has the discretion to adjust the scope of a carbon maintenance obligation by classifying activities as permitted carbon activities, which could be used to allow the exercise of native title rights. Prior to issuing a carbon maintenance obligation, the Clean Energy Regulator will genuinely consult with native title groups and seek legal advice on the individual circumstance to ensure all native title, future act, and state and territory requirements are considered.

For further information about carbon maintenance obligations, see section 98 of the CFI Act or refer to the Department of the Environment and Energy website¹⁸.

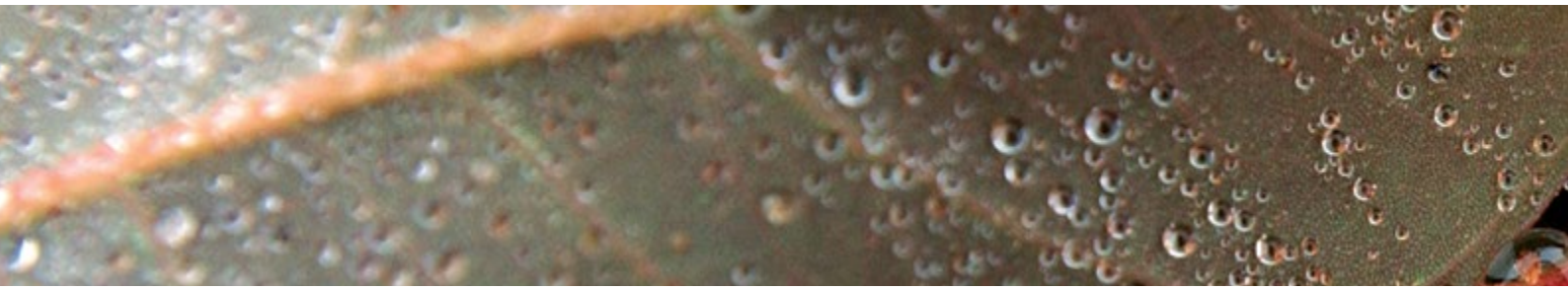
Emissions Reduction Fund projects on land subject to native title

Conducting an Emissions Reduction Fund project on land that coexists with native title rights requires project proponents to consider a variety of factors to ensure legal right and consent requirements are satisfied.

Depending on the type of area-based Emissions Reduction Fund project (and the state or territory jurisdiction where it will be carried out), there are a number of factors to consider before commencing a project on land subject to native title:

- › Proponents must consider if any project activities or approvals related to project activities may be a future act under the Native Title Act—this may continue to apply on land that does not have an existing native title determination or registered claim. For example, if a project proponent wishes to amend a lease to obtain the legal right to undertake the project activity, the future acts regime may be triggered.
- › State and territory land authorities, the National Native Title Tribunal, or Indigenous land councils may be able to provide situation-specific advice about future acts.
- › If a project involves the doing of a future act, the future act must be validated under the future act provisions in Part 2, Division 3 of the Native Title Act.
- › If a future act is invalid in relation to native title (e.g. because an Indigenous land use agreement was required but not obtained), there may be legal consequences.
- › In order to manage the risk associated with uncertainty, proponents may wish to enter into an Indigenous land use agreement under the Native Title Act with all relevant native title holders, claimants, and any other relevant parties to secure project legal right into the future. The agreement should set out the types of activities that are permitted on the land, and who can carry out those activities.
- › The National Native Title Tribunal can facilitate negotiations for entering into and registering Indigenous land use agreements. They can also provide general information regarding native title and future acts.
- › The project proponent has no obligations under the Native Title Act if native title has been extinguished or determined not to exist.
- › Project proponents may need to demonstrate what actions and enquiries were made and with whom, so it is important to keep detailed records. Failure to undertake appropriate due diligence may not only jeopardise a person's ability to carry out the project in the future, but may result in legal action.
- › Projects on land subject to a native title claim will not require eligible interest-holder consent from the native title claimants unless the claim is determined and a registered native title body corporate is established before the project is unconditionally registered or the condition is removed.

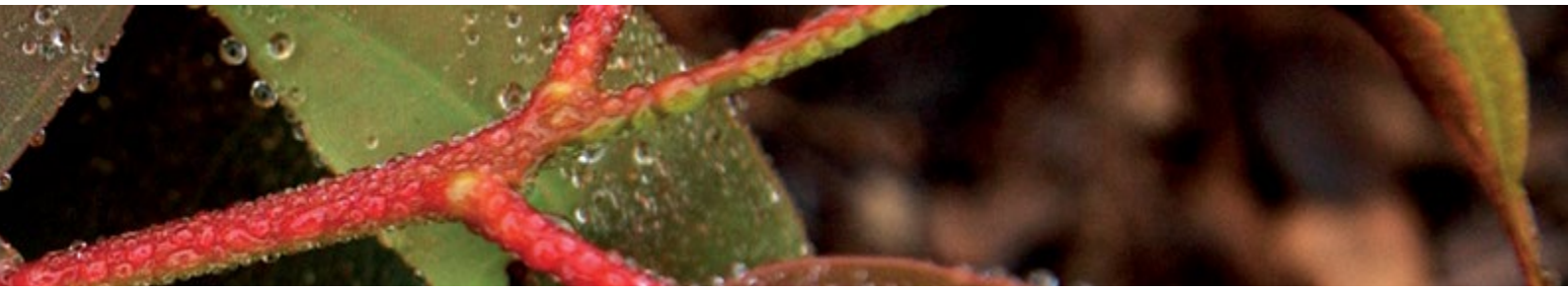
¹⁸ <http://www.environment.gov.au/climate-change/government/emissions-reduction-fund/cfi/permanence>



Managing legal uncertainty

The precise interaction of the Native Title Act and the CFI Act may have legal uncertainties as this is a complex and emerging area of law. To manage the risk associated with uncertainty, the Clean Energy Regulator and the Northern Land Council, Kimberly Land Council and Cape York Land Council strongly recommend that proponents enter into an Indigenous land use agreement under the Native Title Act with all relevant native title holders, claimants and any other relevant parties to secure project legal right and eligible interest-holder consent into the future.

When the Clean Energy Regulator declares that a project is an eligible offsets project, it is not conferring any legal rights on the project proponent, nor is it authorising any activity to be undertaken. The Clean Energy Regulator is only indicating that it is satisfied, based on the evidence submitted by the proponent and its own reasonable enquiries, that the project proponent has met the eligibility requirements (which includes holding legal right) to carry out the project. A declaration of a project is only giving access to earning entitlements if the project activities have been authorised and conducted. The authorisation of project activities under other approvals or grants of interests in land may have future act implications that the project proponent must address.



Example of best practice legal right risk mitigation

For all projects on land subject to native title, the Clean Energy Regulator strongly recommends that proponents consult project stakeholders—including native title holders and registered claimants—using the best practice principles set out in this guidance, including early and genuine consultation and, where appropriate the establishment of Indigenous land use agreements. Best practice consultation will help secure or confirm legal right and eligible interest-holder consent, and gives projects the greatest chance of long-term success.

Proponent A wishes to run a 100-year Emissions Reduction Fund reforestation sequestration project on their pastoral lease land. There is a registered native title claim overlaying part of their project area.

Proponent A checks with their local and state land authorities and confirms that their project activities are permitted under the pastoral lease conditions. They ensure all eligible interest-holder consents, such as the bank mortgaging the property and the Crown lands Minister, have provided consent.

Though the registered native title claimants are not eligible interest-holders under the CFI Act (as the land has not yet had a native title determination), Proponent A wishes to ensure they consent to the running of the project. Besides being good practice and building strong relationships with shared users of their land, Proponent A's consultation with the registered native title claimants will help ensure no legal issues with the project arise in the future, increasing business certainty.

After consulting with the registered native title claimants, obtaining independent advice, and consulting the National Native Title Tribunal, Proponent A enters into an Indigenous land use agreement with the registered native title claimants, setting out the rights of each party with regards to project activities.

With all consents obtained and legal right secured, Proponent A is able to register their project with the Clean Energy Regulator and commence earning ACCUs.

Online project resources

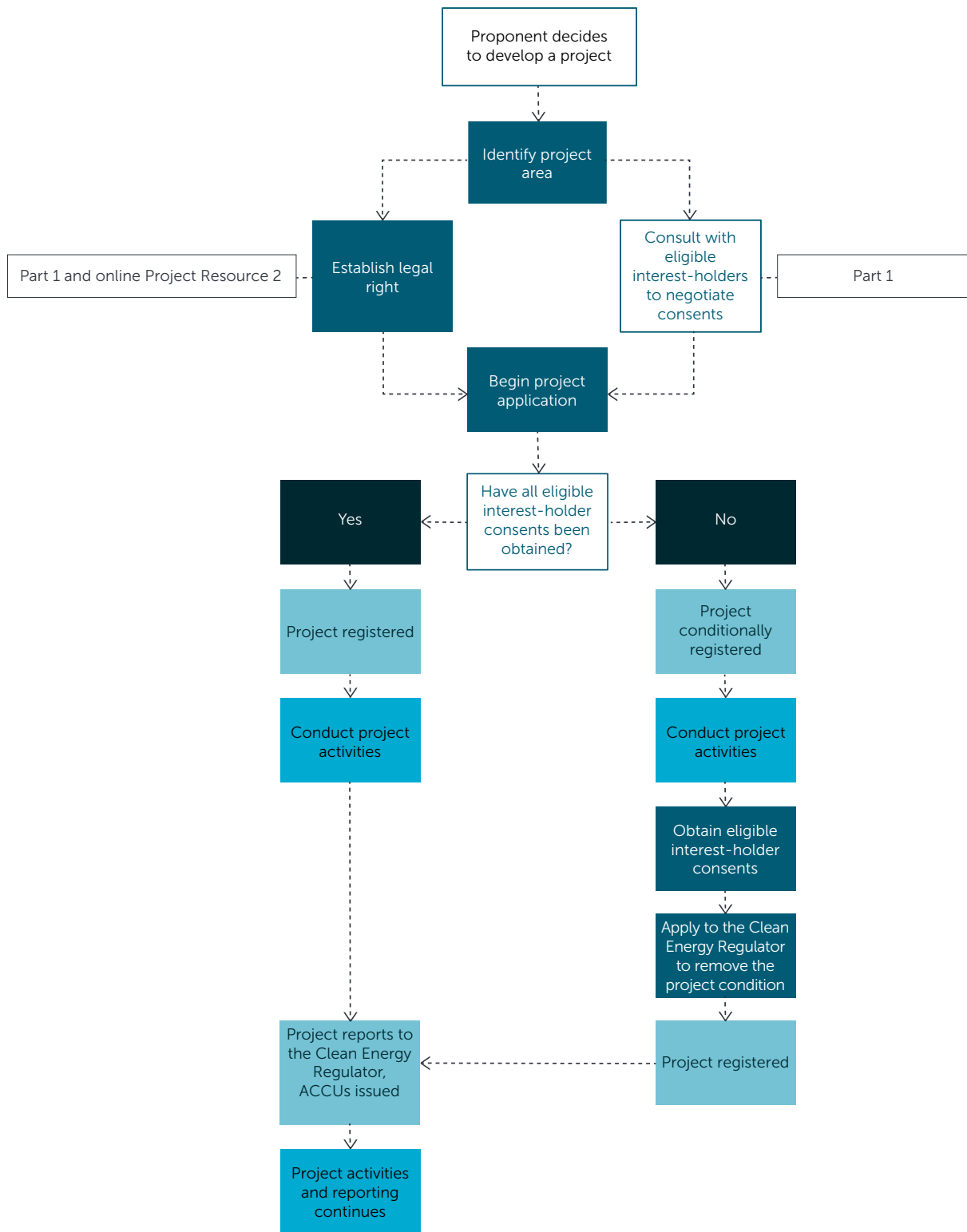
The following resources are available on the Clean Energy Regulator website¹⁹:

- › Project Resource 1: State and territory land law and summary of land rights law
- › Project Resource 2: How does a project proponent demonstrate legal right?
- › Project Resource 3: Identifying native title land

¹⁹ <http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Planning-a-project/native-title>

Appendix 1: Project registration flow chart

Figure 6: Flow chart of project registration considerations



Key:

- Required project application step
- Recommended project application step
- Project activity step
- Clean Energy Regulator decision

Appendix 2: Key concepts

Australian carbon credit unit	<p>An Australian carbon credit unit, or 'ACCU', is a unit issued to a person or organisation by the Clean Energy Regulator by making an entry for the unit in an account kept by the person in the electronic Australian National Registry of Emissions Units. Each ACCU represents one tonne of carbon dioxide equivalent (tCO₂-e) stored or avoided.</p>
Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)	<p>The <i>Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)</i> is an Act of the Australian Parliament about projects to remove carbon dioxide from the atmosphere and projects to avoid emissions of greenhouse gases. These projects are known as 'Emissions Reduction Fund' projects.</p> <p>The <i>Carbon Credits (Carbon Farming Initiative) Act 2011</i> is also referred to as the 'CFI Act'.</p>
Clean Energy Regulator	<p>The Clean Energy Regulator is an independent statutory agency within the environment portfolio of the Australian Government. It is responsible for administering the Emissions Reduction Fund.</p>
Eligible interest-holder	<p>Sections 43 to 45A of the CFI Act contain a list of people and organisations that have an eligible interest in the land where an Emissions Reduction Fund project will be carried out. These people and organisations are called 'eligible interest-holders' and include anyone registered on the relevant land title (e.g. land owner, lease holder, Crown lands Minister, banks and other mortgagees) and registered native title bodies corporate.</p> <p>Every eligible interest-holder must consent to the project registration application (or to the existence of the project registration declaration) before the Clean Energy Regulator can issue ACCUs for the project. The consent must be provided in a form approved by the Clean Energy Regulator. The only exception to this requirement is where the consent is set out in an Indigenous land use agreement. See also section 28A of the CFI Act.</p>
Emissions Reduction Fund	<p>The Emissions Reduction Fund is an initiative of the Australian Government to purchase lowest cost abatement (in the form of ACCUs) from a wide range of sources. It provides an incentive to businesses, households and landowners to reduce their emissions. It is governed by the CFI Act and related legislation.</p>
Future acts	<p>Future acts are acts that take place after 1 January 1994 and affect native title rights and interests, and can include the granting of permits, leases or other interests in land. Future acts are defined in section 233 of the <i>Native Title Act 1993 (Cth)</i>. This definition should be read in conjunction with the definitions of 'act' and 'act affecting native title' in sections 226 and 227 of the <i>Native Title Act 1993 (Cth)</i>.</p>

Appendix 2: Key concepts

Indigenous land use agreement	<p>An Indigenous land use agreement is a voluntary agreement between a native title group and others (e.g. pastoralists, miners and governments) about the use of land and waters. The terms of the agreement are drafted to suit particular circumstances. An Indigenous land use agreement can be:</p> <ul style="list-style-type: none"> > over areas where native title has, or has not yet, been determined > entered into regardless of whether there is a native title claim over the area or not, and > part of a native title determination or settled separately from a native title claim. <p>Once an agreement is registered with the National Native Title Tribunal it is binding on all parties and all members of the relevant native title group.</p>
Legal right	<p>Anyone wishing to carry out an Emissions Reduction Fund project must have the legal right to carry out the project. This term is not defined in the CFI Act because what amounts to legal right depends on the individual facts and circumstances of a project.</p> <p>In the context of an area-based project, a land owner (or lease holder) will generally have the legal right to carry out the project, depending on the terms and conditions of the specific land tenure arrangements. It may also depend on whether the land is native title or land rights land.</p> <p>If a land owner or lease holder has the legal right to carry out an Emissions Reduction Fund project, they can assign the legal right to a third party (such as an agent or aggregator). The assignment should be recorded in writing (e.g. a contract or agreement).</p> <p>In addition to proving they hold the legal right to carry out the project, a project proponent must provide consent from everyone who holds an 'eligible interest' in the project area.</p>
Method	<p>The term method is shorthand for 'methodology determination', which is defined in section 106 of the CFI Act.</p> <p>A method sets out the requirements for a project to be considered to be a specific kind of project and explains how to calculate the 'carbon dioxide equivalent net abatement amount' for the project for each reporting period. This amount allows the Clean Energy Regulator to specify the number of ACCUs issued for a project for a specific reporting period.</p> <p>It may also set out requirements in lieu of particular requirements in the CFI Act (e.g. regulatory additionality) and may specify notification, record-keeping and monitoring requirements.</p>
Native title	<p>Native title is the bundle of rights and interests in land and waters held by Indigenous communities, groups and individuals under traditional laws and customs.</p>

Appendix 2: Key concepts

Native title land	Section 5 of the CFI Act defines an area of land as native title land if there is an entry on the National Native Title Register specifying that native title exists in relation to the area.
Permanence obligation	The permanence obligation means the carbon stored by a project must be maintained for a chosen period—either 25 or 100 years.
Project proponent	A project proponent is the person or organisation who: (a) is responsible for carrying out an Emissions Reduction Fund project; and (b) has the legal right to carry out the project.
Registered native title body corporate	A registered native title body corporate is a body corporate whose name and address are registered on the National Native Title Register under section 193 of the <i>Native Title Act 1993</i> (Cth). The body corporate is nominated by native title holders to represent them and manage native title rights and interests after a native title determination is made.

The background is a solid teal color. On the right side, there are two overlapping, semi-transparent light blue shapes that resemble stylized hills or waves. The top shape is a darker shade of light blue, and the bottom shape is a lighter shade. They overlap in the center-right area.

WWW.CLEANENERGYREGULATOR.GOV.AU