

6.

**INDIGENOUS
RIGHTS AND
INTERESTS**



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Carbon projects affect Indigenous rights and interests in a number of ways, and you will often have multiple and overlapping rights. Your rights depend on the type of interest you have in the land, and the type of interest you have in the carbon project.

INDIGENOUS RIGHTS AND INTERESTS IN CARBON

Under the Carbon Credits (Carbon Farming Initiative) Act 2011 (the CFI Act), there are provisions for two key rights of interest to Indigenous people impacted by a carbon project registered by the CER, including provision for:

1. **Legal Right.** The proponent of a carbon project must be able to demonstrate that they have the legal right to own the carbon project.

Determining whether or not you have the legal right to do a project, and/or what is required to get the legal right will depend on the type of land in question, the type of land interest you have, and the type of activity you want to do.

Whether or not you have a legal right to do a project affects not only whether and how you might want to register a carbon project yourself, but also your rights if other people want to do a carbon project on your country. Indigenous people with a legal right to conduct a carbon project must be given the opportunity to provide Free, Prior, Informed Consent (yes or no) to the project developer for a project on their land.

2. **Eligible Interest-Holder Consent.** Indigenous people may be identified as Eligible Interest Holders and have a right to consent to the project under the CFI Act. This applies to all Native Title determination areas as well as some other Indigenous land interests.

This provides an important point of leverage for any Native Title group.

The CFI Act allows for conditional registration of carbon projects from 2 up to 7 years depending on the type of carbon method applied, although the project cannot claim any credits until consents are provided. However, the ICIN strongly advocates for the Free, Prior and Informed Consent of Native Title holders or claimants to be demonstrated *before* the project is registered with the CER. This benefits both Indigenous groups and any non-Indigenous proponent (see Part 7).

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THE ROLE OF AGREEMENTS IN CARBON PROJECTS

Some Indigenous people may choose to enter into an Indigenous Land Use Agreement (ILUA) or other contract to support strong relationships with non-Indigenous landholder/s or carbon project developers. Agreements can include provisions around access to country, employment of local Indigenous people, support for traditional land management practices, share of ACCUs, revenue or profits from the project, use of images and media, plans to transition to Indigenous ownership, terms of review, and anything else important to parties. These types of agreements are very important given that projects may require a commitment up to 100 years.

Remember, carbon projects that can demonstrate direct and genuine benefits created from the project, such as Indigenous employment or support for Indigenous land management practices, may attract a premium price on the carbon market. Therefore, the agreement should detail how the projects are marketed, if at all, by the proponent, as well as protections to ensure that any images, videos or stories of Indigenous people or details of the group's story are not shared without that group's free, prior and informed consent.

Read More:

[ICIN Seeking free, prior and informed consent from Indigenous communities for carbon projects](#)

“Indigenous Land Use Agreements (ILUAs) can provide a high degree of certainty to project owners and Indigenous groups impacted by a carbon project on their country.”

“Carbon projects that can demonstrate direct and genuine benefits created from the project may attract a premium price on the carbon market.”



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PROJECT PROPONENT (OWNERSHIP)

If you are a lessee, freeholder, or have some form of exclusive possession land interest, you may have a legal right to undertake the carbon project. This means that:

- You could choose to register a carbon project for yourself.
- Someone else can register a carbon project on your land – only with your permission.

Undertaking a carbon project is a big decision. If you decide to own and operate a carbon project as the Project Proponent, you have ongoing responsibilities. If you don't meet these responsibilities, there may be serious consequences for you and your organisation.

It is a good idea to talk to existing Project Proponents and learn from their experiences. However you will find that what works well for one organisation, will not necessarily fit perfectly for another. Don't be afraid to adapt different approaches to suit your unique circumstances.

Below is a list of some of the main types of governance models – but this is not exhaustive!

- **Registered Native Title Body Corporate as Project Proponent**

Under the ERF, there are certain rules which can deem a RNTBC with exclusive possession native title to be the Project Proponent. This can streamline the process of project registration and establishing legal right to run the project.

However, just because these rules exist, doesn't mean you have to choose this option. The rules will help RNTBCs establish the legal right to do a carbon project if they want to, but it does not prevent you from choosing another governance model.

No matter who is the Project Proponent, what decisions could be delegated? And to whom? You may decide to contract someone to do certain parts of the project for you (e.g. annual reporting) or appoint an Agent who can act as your representative.

- **Indigenous landowner as Project Proponent**

For non-native title land, such as an Indigenous pastoral lease, another option is for the Indigenous landholder to be the Project Proponent. You could decide to run all aspects of the project yourself, or to outsource some of these to experts or land managers.

- **Joining together with other Indigenous projects**

Joining together with other Indigenous projects – through either 'aggregating', cooperating, or collaborating, is another governance approach which has proven successful. Aggregation allows groups to pool resources and jointly manage risks.

Within an aggregation approach, there are a lot of variables. For example, you could choose to share revenue and benefits jointly, or distribute them according to project land area, or contribution to the project or baseline. If you choose an aggregation approach, you can still shape up a governance model that suits your individual circumstances. It is important in aggregation models that all legal right holders are committed to the project for the crediting period. This is because if one party decides to withdraw from the project, it will affect the whole project's ability to continue unless that part of the project area can be removed. Some methods do not allow areas to be removed.

- **Setting up an Indigenous carbon business**

You may decide that it is worthwhile setting up a new company or business which is focused on the job of owning and running the carbon project. For this to be successful, you would need to have a good business plan and make sure that the benefits will outweigh any costs of setting up and running a new corporation.

- **Third-party Project Proponent**

One governance model is to negotiate an agreement with a carbon service provider and let them own, manage and take on costs and risks of the project in exchange for access to your land and a fee and/or other benefits. This may be a good option, particularly if you don't have much expertise about how to do it yourself, and don't care too much about who owns the project. However, through this arrangement you may lose a level of control over the project and what happens on your land, as well as a significant proportion of the benefits so it is important to understand what it is you are negotiating.

If you are thinking about this type of approach, it is important to do your research on the organisation you are partnering with and understand all fees involved, and how the carbon service provider profits from the relationship. Remember, this will be a long-term business relationship, and so you want to make sure you can work well together.

If the proposed partnership involves splitting revenue (as opposed to profit), your feasibility study should carefully check what your costs will be, and make sure you won't be out of pocket if there is a bad year. You also need to be clear about who is responsible for any risks.

Remember, there are other governance approaches which let you outsource the running of the project to experts, without handing over project ownership. Seek independent legal and business advice, and a strong contract, so that if anything does go sour, your rights are protected. One way you can make these terms clear is through an Indigenous Land Use Agreement.

Read More:

[ICIN Guide 9. Planning a carbon project – governance](#)

[CER Being a Project Proponent – information for landholders](#)



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ELIGIBLE INTEREST HOLDER

In addition to legal rights in carbon projects, some people also have an 'eligible interest'. The ERF sets out exactly who holds an eligible interest, based on land tenure. For example, native title holders are one type of eligible interest holder.

Having an eligible interest means:

- You have a right to say 'Yes' or 'No' to the carbon project
 - You might choose to negotiate benefits from the carbon project, in exchange for your consent; or you might choose to say no to the project.
 - This is an absolute right of veto, you do not have to negotiate, and you do not have to say yes.
- The carbon project cannot earn carbon credits unless it has your consent, but it can be 'conditionally' registered.
- If you have not given consent by the end of the first reporting period, the project must be cancelled.

For example, your Registered Native Title Body Corporate (RNTBC) holds non-exclusive native title interests over a National Park. The National Parks authority can register a carbon project over the park but they cannot earn any carbon credits until they have your consent.

"Having an eligible interest means you have the right to say 'Yes' or 'No' to the carbon project."

NATIVE TITLE RIGHTS

If you are a native title holder over an area proposed for a carbon project, you might also have rights under the *Native Title Act*. These would be additional to your rights under the ERF.

Because sequestration projects affect what you can or cannot do on your country for a long time, these projects may be considered a 'future act', requiring your consent under the *Native Title Act*. If the carbon project requires the grant of additional rights or amendment of any existing interest, this may also be a future act, requiring consent. This is an unsettled area of law, and you should seek legal advice on your specific rights.

For example, your RNTBC holds native title over a lease area. The lessee wants to do a carbon project. The relevant government authority informs the lessee that they will need a special licence to do the carbon project. The grant of this licence may be a future act.

OTHER LEGAL RIGHTS

Additional rights may arise out of State law or regulation, common law, or contract law.

For example, when dealing with a third party about a carbon project on your country, you can negotiate additional contractual rights. You might negotiate to be paid a certain amount, or to require certain levels of reporting on the project, and those rights would be protected under the contract.

Read More:

ICIN [Seeking free, prior and informed consent](#)

CER [Native title, legal right and eligible interest-holder consent guidance](#)



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