

## **EXPLANATORY STATEMENT**

Issued by Authority of the Minister for Climate Change and Energy

*Clean Energy Regulator Act 2011*

*Clean Energy Regulator (Human-Induced Regeneration Projects) Direction 2023*

### **Legislative Authority and General Outline**

The *Clean Energy Regulator Act 2011* (the Act) establishes the Clean Energy Regulator (Regulator) and the legislative framework for imposing powers and functions on the Regulator. Section 41 of the Act allows the Minister to, by legislative instrument, give directions to the Regulator in relation to the performance of its functions and the exercise of its powers. The Regulator must comply with a direction from the Minister made under subsection 41(1) of the Act.

The *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act) enables the Regulator to register projects, and issue Australian carbon credit units (ACCUs) for greenhouse gas abatement activities undertaken as part of the Australian Government's carbon crediting scheme, including for human-induced regeneration (HIR) projects. Legislative requirements to conduct HIR projects and earn ACCUs are set out under the CFI Act, the *Carbon Credits (Carbon Farming Initiative) Rule 2015* and the methods made by the Minister under section 106(1) of the CFI Act, namely the *Carbon Credits (Carbon Farming Initiative) (Human-Induced Regeneration of a Permanent Even-Aged Native Forest—1.1) Methodology Determination 2013* (the HIR methodology) and earlier versions of it. The HIR methodology provides rules for crediting emissions reductions to landholders who regenerate native forest where native forest has been suppressed for at least 10 years. It also specifies how ACCUs must be generated to meet the legislated Offsets Integrity Standards in section 133 of the CFI Act.

The Regulator has a range of compliance and enforcement powers and functions, including a power under section 215 of the CFI Act to appoint a registered greenhouse and energy auditor as an audit team leader to carry out an audit of a person's compliance with one or more aspects of the CFI Act, the CFI Rule, and relevant sections of the Criminal Code. Section 75 of the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) provides for the conduct of an audit under section 215 of the CFI Act. Various requirements applicable to auditors are in Subdivisions 6.6.2 to 6.6.4 of the *National Greenhouse and Energy Reporting Regulations 2008*. These include the Code of Conduct, general independence requirements, which include avoiding conflicts of interest, and other independence requirements. Related requirements are also set out in the *National Greenhouse and Energy Reporting (Audit) Determination 2009* (Audit Determination).

### **Purpose**

It is a government priority to maintain and strengthen the integrity of ACCUs issued by the Regulator for HIR greenhouse gas abatement activities undertaken as part of the Australian Government's carbon crediting scheme. In furtherance of this, the purpose of the *Clean*

*Energy Regulator (Human-Induced Regeneration Projects) Direction 2023* (the Direction) is to ensure, to the extent legally practicable and recognising the priority given to ensuring the integrity of carbon abatement, the Regulator implements recommendation 8 of the Final Report of the Independent Review of Australian Carbon Credit Units (Final Report).<sup>1</sup>

Recommendation 8 (extracted below) is about enhancing the implementation of the HIR methodology:

Recommendation 8. Project administration for the human-induced regeneration (HIR) method should ensure that all HIR projects conform to its current intent: that it is reasonable to expect that the project area will become native forest, attain forest cover, and permanently store carbon as a direct result of project management actions.

8.1 The method should be interpreted as requiring:

- evidence of a causal relationship between the nominated eligible HIR activity or activities and the dominant suppression mechanism(s) that occurred through the entirety of the baseline period;
- demonstration that these suppressors are directly addressed by the HIR activity or activities throughout the life of the project; and
- demonstration that the application of FullCAM is consistent with the guidelines.

8.2 Each project must meet these criteria before future ACCUs may be issued.

8.3 The CER should include nominated suppression mechanism(s) and eligible HIR activities for new and existing projects on the project register, as soon as feasible, and routinely publish project assessment data and results.

The Direction, consistent with recommendation 8, directs the Regulator:

- on administering the HIR methodology
- to publish HIR project information
- to give priority to compliance of audits of HIR project proponents; and
- on appointing auditors for audits of HIR project proponents.

While not included in recommendation 8, the use of compliance audits for HIR project proponents will add further assurance that crediting for these projects reflects real abatement. The Direction is to apply to the HIR methodology (and any earlier version of the HIR methodology) applicable to a project for a reporting period in accordance with section 125, 126, 127 or 130 of the CFI Act.

## **Background and Consultation**

On 1 July 2022, the Australian Government announced it would strengthen carbon trading in Australia by appointing an independent panel, led by former Chief Scientist Professor Ian Chubb AC, to review the integrity of ACCUs under Australia's carbon crediting scheme. The purpose of the review was to ensure ACCUs and the carbon crediting framework maintain a

---

<sup>1</sup> Chubb, I., Bennett, A., Gorring, A., Hatfield-Dodds, S., 2022, Independent Review of ACCUs, Department of Climate Change, Energy, the Environment and Water, Canberra, December. CC BY 4.0. (Webpage, 24 April 2023) <<https://www.dceew.gov.au/climate-change/emissions-reduction/independent-review-accus>>.

strong and credible reputation supported by participants, purchasers and the broader community. The review explored how the scheme can best support Australia's emission reduction targets, support cultural, social, economic and environmental outcomes and address concerns raised about the scheme's integrity.

The Final Report concluded that the ACCU scheme arrangements are sound and recommended some changes to strengthen the scheme. The Direction to the Regulator is consistent with recommendation 8 of the Final Report. The independent panel consulted widely during the review, inviting submissions and meeting with key stakeholders and participants in the ACCU scheme including academics and experts, First Nations groups, project proponents, carbon service providers, industry groups, business, the community, and Commonwealth and state government agencies.

The policy of using a direction to enhance the implementation of recommendation 8 was announced on 27 March 2023 with the Safeguard Reforms and discussed with relevant stakeholders as part of the announcement. The Regulator was consulted on issues related to the implementation of the Direction. The Minister for Climate Change and Energy (the Minister) considered that it was not necessary to consult further with key stakeholders and participants in the ACCU scheme given the extensive consultation that was undertaken by the independent panel as part of its review of the ACCU scheme and that the Direction is consistent with recommendation 8 of the Final Report and the 27 March announcement.

### **Compliance with Legislative Conditions**

Section 41 of the Act has several limitations on the giving of a direction under subsection 41(1). A direction by the Minister under subsection 41(1) must be of a general nature only (subsection 42(2)); must not be inconsistent with the objects of the CFI Act, the NGER Act, or the *Renewable Energy (Electricity) Act 2000* (REE Act) (subsection 41(3)); and must not be inconsistent with Australia's greenhouse gas emissions reduction targets (subsection 41(3A)).

The Direction complies with these legislative conditions by being a direction of a general nature, consistent with the objects of the relevant acts (section 3 of the CFI Act; section 3 of the NGER Act; and section 3 of the REE Act) and is consistent with 'Australia's greenhouse gas emissions reduction targets' as defined in section 4 of the Act. The Direction implements a policy to strengthen the integrity of ACCUs issued by the Regulator for HIR greenhouse gas abatement activities undertaken as part of Australia's carbon crediting scheme.

### **Impact and Effect**

The Office of Impact Analysis has been consulted. Consistent with the Government's Impact Analysis requirements, the Department of Climate Change, Energy, the Environment, and Water (the department) has certified the Independent Review of Australian Carbon Credit Units (Chubb Review) as meeting the requirements of an Impact Analysis. The Chubb Review Final Report is available online at: <https://www.dcceew.gov.au/climate-change/emissions-reduction/independent-review-accus> (the reference number for this matter is: OBPR22-038288).

## **Details and Operation**

Details of the Direction, including commencement details, are set out in Attachment A.

The Direction is a legislative instrument for the purposes of the *Legislation Act 2003*.

Section 42 (disallowance) of the Act; and Part 4 of Chapter 3 (sunsetting) of that Act do not apply to the Direction for the reasons outlined below.

The Direction is exempt from disallowance by regulations made for the purposes of paragraphs 44(2)(b) of the *Legislation Act 2003*. Section 44 of that Act is titled ‘Legislative instruments that are not subject to disallowance’. Paragraph 44(2)(b) provides that the disallowance procedure outlined in section 42 does not apply if ‘the legislative instrument is prescribed by regulation’ for the purposes of that paragraph. Section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* is titled ‘Classes of legislative instruments that are not subject to disallowance’. Item 2 in the table in section 9 specifies ‘An instrument that is a direction by a Minister to any person or body’. The Direction is exempt as it is such an instrument, being a direction made by the Minister to the Regulator. This is a common and longstanding exemption, recognising the importance of statutory bodies being accountable to the responsible Minister and noting that a direction does not override the legislative requirements for the Regulator.

The Direction is exempt from sunsetting by regulations made for the purposes of section 54 of the *Legislation Act 2003*. Part 4 of that Act is titled ‘Sunsetting of Legislative Instruments’. Section 54 is titled ‘Instruments to which this Part does not apply’ and it provides that certain instruments are exempted from the operation of Part 4. Paragraph 54(2)(b) provides that this part does not apply in relation to a legislative instrument if the legislative instrument is prescribed by regulation for the purposes of that paragraph. Item 3 in the table in section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, prescribes an instrument that is a direction by a Minister to any person or body regulation for the purposes of paragraph 54(2)(b) of the Act. The Direction is exempt as it is such an instrument, being a direction made by the Minister to the Regulator.

The Direction refers to recommendations of the Final Report and incorporates the Final Report by reference. Specifically, recommendation 8 on page 20 of the Final Report (being the report cited as: Chubb, I., Bennett, A., Gorring, A., Hatfield-Dodds, S., 2022, Independent Review of ACCUs, Department of Climate Change, Energy, the Environment and Water, Canberra, December. CC BY 4.0). The Final Report is accessible on the department’s website at: <<https://www.dceew.gov.au/climate-change/emissions-reduction/independent-review-accus>>. This incorporation by reference is lawful as the document being incorporated (the Final Report) is as it exists at the time the direction is made, consistent with sub-paragraph 14(b)(i) of the *Legislation Act 2003*.

## **Statement of Compatibility with Human Rights**

The statement of compatibility with human rights has not been prepared as under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a statement of compatibility with human rights is only required for disallowable instruments.

**Details of the proposed *Clean Energy Regulator (Human-Induced Regeneration Projects) Direction 2023***

Part 1—Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Clean Energy Regulator (Human-Induced Regeneration Projects) Direction 2023*.

Section 2 – Commencement

The effect of this section is that the whole of the instrument would commence on the day after it is registered on the Federal Register of Legislation. The note to this section provides that the instrument is not subject to certain sunseting and disallowance provisions in the *Legislation Act 2003*.

Section 3 – Authority

This section states that this instrument is made under subsection 41(1) of the *Clean Energy Regulator Act 2011*.

Section 4 – Definitions

This section provides for definitions used in the instrument. The note to this section clarifies that the definition of ‘offsets project’ and ‘Regulator’ in this instrument have the same meaning as those definitions in section 4 of the *Clean Energy Regulator Act 2011*.

Section 5 – Object

This section provides that the object of the Direction is to ensure, to the extent legally practicable and recognising the priority given to ensuring the integrity of carbon abatement, the Regulator implements recommendations 8 of the Final Report of the Independent Review of ACCUs. A note to the section clarifies that recommendation 8 concerns project administration for the *Carbon Credits (Carbon Farming Initiative) (Human-Induced Regeneration of a Permanent Even-Aged Native Forest—1.1) Methodology Determination 2013* (HIR methodology).

Part 2 — Direction to the Regulator

Section 6 – Direction on administering the HIR methodology

This section provides that the Regulator must, to the extent permitted by law, administer the HIR methodology consistently with recommendations 8.1 and 8.2 of the Final Report of the Independent Review of ACCUs (Final Report). The note to this section clarifies that the HIR methodology applies to an HIR project and sets out requirements that must be met for an HIR project to be an eligible offsets project.

The inclusion in this section of the words ‘to the extent permitted by law’ recognises that the requirements of the applicable HIR methodology are relevant to the application of recommendation 8.1 or 8.2. For example, early versions of the HIR methodology did not require the use of the Full Carbon Accounting Model (FullCAM), but instead required use of an online tool for estimating carbon stock in an area called the Reforestation Modelling Tool, or RMT. It follows that for any legacy HIR projects still subject to those versions of the HIR methodology, the recommendation that the HIR methodology should be interpreted as requiring demonstration that the application of FullCAM is consistent with the guidelines would not apply in the same way.

#### Section 7 – Direction to publish HIR project information

This section provides that the Regulator must, to the extent permitted by law, publish the information recommended to be published by recommendation 8.3 of the Final Report.

The effect of the direction would be to require the Regulator to consider whether it could lawfully publish the information, and do so to the extent possible.

#### Section 8 – Direction to prioritise compliance audits of HIR project proponents

This section provides that, in its approach to initiating compliance audits under subsection 215(1) of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act), the Regulator must give priority to audits of the compliance of HIR project proponents with their obligations under the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (CFI Rule), particularly the eligibility requirements under section 9AA of the CFI Rule, taking into account project risk.

The note to this section notes that the Regulator has a power under section 215 of the CFI Act to appoint a registered greenhouse and energy auditor as an audit team leader to carry out an audit of a person’s compliance with one or more aspects of the *Clean Energy Regulator Act 2011* (Act), the CFI Rule, and relevant sections of the Criminal Code.

#### Section 9 – Direction on appointing auditors for audits of HIR project proponents

This section applies in relation to an audit initiated by the Regulator under subsection 215(1) of the CFI Act, where the person whose compliance with the Act or associated provisions is to be audited is an HIR project proponent. This section sets out certain things that the Regulator must be satisfied of before appointing a registered greenhouse and energy auditor as an audit team leader to carry out the audit. These are:

- the auditor has appropriate skills and experience as necessary to carry out the audit; and
- either the auditor has skills and experience in relation to ecological assessment; or the auditor will select one or more audit team members with skills and experience in relation to ecological assessment to assist in carrying out the audit; and
- in carrying out the audit, the auditor will comply with the requirements of Subdivisions 6.6.2 to 6.6.4 of the *National Greenhouse and Energy Reporting Regulations 2008* (NGER Regulations) and the requirements of the *National Greenhouse and Energy Reporting (Audit) Determination 2009* (Audit Determination).

The note to the section clarifies the matters that Subdivision 6.6.2 to 6.6.4 of the NGER Regulations deal with.

#### Section 10 – Application of this direction

This section provides that the Direction applies subject to the Act, the CFI Act, the NGER Regulations, the Audit Determination and the HIR methodology.