



13 February 2015

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Via email: [ERF@treasury.gov.au](mailto:ERF@treasury.gov.au)

Dear Mr Lee

**Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015**

Thank you for your invitation to provide a submission to the Government's proposed exemptions from the *Corporations Act 2001* and *Corporations Regulations 2001* (the corporations law) for participants in the Emissions Reduction Fund's (ERF) processes.

The Carbon Market Institute (CMI) supports a market-based approach to emissions reduction to achieve Australia's emissions reduction target.

The attached document provides the background to CMI's submission, the key issues and principles framing the Institute's submission and key issues for consideration in the proposed exemptions for Emissions Reduction Fund participants.

This CMI submission was developed from consultation with selected CMI members through one-on-one meetings and telephone consultations. The submission represents a synthesis of CMI member views, but is not representative of any individual company/member view.

If you have any questions, please do not hesitate to contact me by emailing [peter.castellas@carbonmarketinstitute.org](mailto:peter.castellas@carbonmarketinstitute.org) or [tim.richards@carbonmarketinstitute.org](mailto:tim.richards@carbonmarketinstitute.org), or by phoning 03 8601 1142.

Yours sincerely

**Peter Castellias**  
Chief Executive Officer

*Attachment: Carbon Market Institute submission – Emissions Reduction Fund Exposure Draft Legislation May 2014.*



**CARBON MARKET**  
INSTITUTE

**Carbon Market Institute**

**Submission - Corporations Amendment  
(Emissions Reduction Fund Participants) Regulation 2015**

**February 2015**

# 1. ABOUT THE CARBON MARKET INSTITUTE

The Carbon Market Institute is an independent membership-based not-for-profit organisation. Our aim is to assist Australian businesses in meeting the challenges and opportunities associated with market-based approaches to emissions reduction and the transition to a low carbon economy.

As the peak body for carbon market participants, CMI has established an important role in the evolution of the carbon market in Australia. The Institute facilitates the networks, knowledge exchange and commercial interaction amongst key government policy makers and regulators, industry, financiers and investors, professional services companies and technology solution providers.

CMI membership represents a broad range of professionals, organisations and industry. Our members include leading professional service providers, NGERs reporting entities, secondary market participants, offset providers, academia and international organisations. Individuals within the CMI membership base are some of Australia's most respected carbon market innovators and leaders.

CMI's Working Groups have played a key role in connecting government, bureaucrats and regulators with industry to facilitate the constructive input of member views into policy implementation. Drawing on the expertise of the CMI membership, the Working Groups have provided a vital forum for the exchange of information between market participants, policy makers and government agencies.

This CMI submission was developed from consultation with selected CMI members through one-on-one meetings and telephone consultations. The submission represents a synthesis of CMI member views, but is not representative of any individual company/member view.

## 2. KEY ISSUES AND PRINCIPLES TO CONSIDER

The Government's consultation paper on the proposed exemptions from the *Corporations Act 2001* and *Corporations Regulations 2001* for participants in the Emissions Reduction Fund (ERF) processes states the proposed exemptions reflect the Government's commitment to simplify the application of the financial services provisions of the corporations law for ERF participants.

The consultation paper also argues that the generic financial services laws are not well suited to protecting participants against the risks associated with the ERF process and, in some cases, impede the efficient and effective operation of the ERF.

The Carbon Market Institute makes comment on the following key issues to consider in determining the suitability of proposed exemptions reducing impediments to the efficient and effective operation of the ERF.

The key issues and principles which we have expanded on below relate to:

- **Ensuring the integrity of the ERF** - minimising the risk posed by less experienced/informed operators participating in the ERF.
- **Consumer protections** - ensuring appropriate protections are still provided to consumers.
- **Participation in the secondary market** - addressing potential barriers to participation in the secondary market.
- **Defining circumstances under which targeted exemptions may apply** - considering the application of targeted exemptions to Australian Financial Services Licence (AFSL) requirements.
- **Delivery of emissions abatement** - providing the appropriate assurances that the ERF will deliver emissions abatement.

### 2.1. Ensuring the integrity of the ERF

For the ERF to operate successfully and achieve high levels of participation from a diverse range of project types, ensuring the integrity of the fund an auction process is essential. In the event the integrity of the fund is undermined, confidence in the market may also be undermined and participation affected.

The requirement under the current law for carbon service providers to hold an AFSL for the provision of incidental financial product advice provides confidence that licence holders will uphold high standards and reputable conduct. At the same time, service providers who hold an AFSL incur costs and administrative burdens to meet requirements in procuring, maintaining and operating under AFS licensing requirements. These cost and administrative burdens may form barriers to obtaining an AFSL for those who do not already hold a licence.

Providing the proposed targeted exemptions for carbon service providers who provide financial product advice which is incidental to technical advice relating to an ERF project may increase participation in the ERF, particularly for some participants who do not hold an AFSL and may find it difficult to procure one. Increased participation in the ERF would have the added benefit of improving market liquidity.

At the same time, the proposed exemption may increase the risk of negative consequences arising from less experienced or less informed parties participating in the ERF who are not obligated to uphold the standards of AFSL holders. Should such parties participate in the ERF with projects that ultimately fail to deliver contracted abatement, the integrity of the fund and market confidence may be undermined, two elements which are key to an efficient, transparent and functioning market.

We acknowledge that while the removal of the requirement to hold an AFSL when providing incidental financial advice may increase the risk of less experienced or less informed participants, the Clean Energy Regulator will apply a high degree of rigour, such as the fit and proper person test, when undertaking due diligence assessments of participant applications to register projects. This rigour will also apply during the auction registration and qualification processes, providing further checkpoints to recognise and potentially exclude unsuitable participants.

It is important to consider whether the current duplication of rigour, through the current requirement for carbon service providers to hold an AFSL and through the due diligence of prospective participants undertaken by the Clean Energy Regulator, is necessary and whether exempting carbon service providers from the financial product advice provisions of the Act in certain circumstances will increase the efficient and effective operation of the ERF. At the same time, the importance of preventing unsuitable participants and ensuring the integrity of the ERF cannot be overstated.

## **2.2. Consumer protections**

Further to the considerations which should be given to the risk of undermining the integrity of the ERF, the requirement for carbon service providers to hold an AFSL provides consumers with a number of protections. When procuring products or services from an AFSL holder, consumers have the knowledge and confidence that the licence holder is a reputable operator who upholds the standards required of an AFSL. The proposed targeted exemption to remove the requirement for some carbon service providers to hold an AFSL when providing incidental financial advice also risks reducing the consumer protections afforded to the public and clients. This issue may be considered primarily in aggregation arrangements where carbon service providers may be dealing with clients with less experience or understanding of potential risks that may be faced.

## **2.3. Participation in the secondary market**

Sub-regulation 7.1.071(2) of the Corporations Regulations specifies that ACCUs are financial products and persons carrying on a business of providing financial services in relation to ACCUs are required to hold an AFSL. This means that persons undertaking many activities relating to participation in the secondary market, such as brokering trades or trading ACCUs on behalf of others, would be required to hold an AFSL.

While at present persons trading in ACCUs on their own behalf are not considered to be dealing and are therefore not required to hold an AFSL, dealers in ACCUs, such as aggregators, are required to hold an AFSL (at present).

Due to this requirement, the proposed exemption to provide targeted exemptions for carbon service providers who provide incidental financial product advice from holding an AFSL must be considered with recognition of secondary market participation.

Secondary market participation must be considered through both the ERF auction process and direct project development (no auction) ERF participation channels. ERF participants may participate in the secondary market through either channel, by selling ACCUs in excess to those contracted (ERF auction process channel) or by developing a project without participating in the ERF auction process (direct project development channel).

If an exemption is created for the requirement for carbon service providers who provide incidental financial product advice to hold an AFSL but no exemption is created for those trading in the secondary market to hold an AFSL, a barrier to participation in the secondary market may arise. This may be particularly apparent under some aggregation scenarios where the carbon service provider is not required to hold an AFSL to establish an aggregation arrangement, but is required to hold an AFSL to participate in the secondary market. Under this scenario, regardless of whether the ERF auction or direct project development channel is used, the aggregator would be unable to participate in the secondary market without an exemption to the requirement to hold an AFSL.

#### **2.4. Defining circumstances under which targeted exemptions may apply**

The proposal to provide a targeted exemption for carbon service providers who provide incidental financial advice in relation to ERF processes from the requirement to hold an AFSL raises the important issue of defining under which circumstances a targeted exemption is applicable.

While the Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015 consultation paper provides several examples of “some circumstance” where targeted exemptions may be appropriate, such as a carbon service provider advising on the price per ACCU a project proponent should bid, these examples are not exhaustive.

It is important to consider under which circumstances a targeted exemption may be applicable and under which circumstances it may not, as without appropriate definitions of these circumstances conflicts may arise between participants who are granted a targeted exemption and those who are not. This possible uncertainty risk may in turn serve as a barrier to participation and/or increase the administration required of the Clean Energy Regulator. Furthermore, where the circumstances under which targeted exemptions apply are not clearly defined, the risk of gaming and/or unscrupulous behaviour aimed at gaining a targeted exemption increases.

#### **2.5. Delivery of emissions abatement**

The proposed exemptions concerning the provision of financial advice and particular aggregation arrangements for ERF participants and carbon service providers may increase the risk of negative consequences from less experienced or less informed participants. In addition to the consequences which may arise outlined in section 2.1, there may be additional risks associated with abatement delivery.

The proposed targeted exemptions for carbon service providers and/or aggregators to hold AFSLs may provide an opportunity for inexperienced or poorly informed and therefore sub-optimal service providers or aggregators to participate in the ERF. These service providers or aggregators may provide inaccurate estimates of potential abatement and/or may be at greater risk of contractual default.

While there are provisions in the carbon abatement contract, such as liquidated damages, to address under-delivery of contracted abatement, the risk of contractual default and non-delivery may still exist. In extreme cases, such as an unscrupulous participant acting as a phantom company, the Clean Energy Regulator may not be able to successfully enforce liquidated damages. In the event of non-delivery, the Clean Energy Regulator may be exposed to increased costs associated with purchasing ACCUs on the secondary market and/or reduced delivery of abatement towards Australia's 2020 emissions reduction target. While the ERF is not exclusively aimed at achieving Australia's 2020 emissions reduction target, it may provide a substantial contribution. With the proposed easing of AFSL requirements for ERF participants may come the increased risk of under delivery of abatement and a greater challenge in achieving Australia's 2020 emissions reduction target.

For further information contact:

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