EXPLANATORY STATEMENT

Issued by the Minister for Energy and Emissions Reduction

Carbon Credits (Carbon Farming Initiative) Act 2011

Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020

Purpose of Amendment Rule

The *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act) enables the crediting of greenhouse gas abatement from emissions reduction activities across the economy. Greenhouse gas abatement is achieved either by reducing or avoiding emissions or by removing carbon from the atmosphere and storing it in soil or trees.

The *Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020* (the ***Amendment Rule***) enables the transition of Emissions Reduction Fund projects between project proponents, where the registered project proponent is either unwilling or unable to continue with the project. It does this by amending the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (the ***Principal Rule***).

Background: Emissions Reduction Fund

In 2014, the Australian Government amended the Act with the *Carbon Farming Initiative Amendment Act 2014* (CFI Amendment Act). The CFI Amendment Act established the Emissions Reduction Fund by expanding the crediting of emissions reductions under the Carbon Farming Initiative to non-land based sectors of the Australian economy.

The primary objective of the Emissions Reduction Fund is to assist Australia to meet its greenhouse gas emissions reduction targets, consistent with its international obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol.

The Emissions Reduction Fund does this by crediting and purchasing approved and verified emissions reductions from registered projects (projects declared under section 27 of the Act). The Clean Energy Regulator (the Regulator) is empowered under the Act to conduct processes to purchase emissions reductions, and enter into contracts for this purpose. Credits for abatement can also be sold to third parties on the private market.

Background: project proponents

All registered Emissions Reduction Fund projects must have a project proponent. The project proponent must be the person responsible for the project and have the legal right to carry it out. They must continue to meet these criteria across the life of the project in order to receive Australian Carbon Credit Units (ACCUs) for the emissions reduction achieved by the project. If the listed proponent ceases to meet the criteria, the Regulator can revoke the declaration of the project.

The Principal Rule allows for a new project proponent to be identified on a declaration of an eligible offsets project. This is designed to let projects move to a new project proponent when the person identified as project proponent no longer meets the legal definition, or to add another project proponent.

There is a range of circumstances where projects may need to transition to a new project proponent. These include the death of a proponent, the sale of property and the end of a legal arrangement that conferred legal right on a particular person.

The Principal Rule does not provide for a number of situations where project arrangements may change and the project should be able to be transferred to a person who has become responsible for the project, and has the legal right to undertake the project, after it was first declared. For example, this could be a situation where a carbon service provider has abandoned a project, become insolvent, or is voluntarily revoking the project but the landholder on whose land the project is being conducted wishes to continue with the project and is willing to take on responsibility for it. The Amendment Rule allows a person who meets the statutory definition of project proponent (has responsibility for the project and the legal right to carry it out), to make an application to be listed as the project proponent in these circumstances.

The Amendment Rule ensures that relevant parties are informed and are consulted in the process of changing proponents. It allows projects to continue that would have otherwise failed, provided that the listed and proposed new project proponent have both behaved appropriately.

Operation

The Act is supported by subordinate legislation, including the Principal Rule, and the *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (the Regulations). The Principal Rule and Regulations provide detailed explanations of the way in which the Act is administered by the Regulator.

The Minister for Energy and Emissions Reduction is empowered to make legislative rules under section 308 of the Act. The Amendment Rule supports the transition of Emissions Reduction Fund projects between proponents, in particular circumstances.

Section 24 of the Principal Rule is being amended to allow the Regulator to vary the project proponent on a declaration in certain circumstances, such as where an existing proponent is unable or unwilling to continue the project. In more complex cases the Regulator must consider, amongst other matters, the actions of the applicant, landholders, and identified proponent to ensure parties have not caused the circumstances for the project transfer to occur before deciding on whether to vary the project proponent.

Sections 29, 30, and 33 are being amended to inform anyone that has the responsibility and legal right to carry out the project, that an application to voluntarily revoke the project has been made. This is to allow them an opportunity to apply to become the new project

proponent and decisions under these sections may be delayed while a new project proponent is being identified.

Detailed description of the Amendment Rule

Attachment A outlines and describes the sections in the Amendment Rule.

Public consultation

Public consultation on an Exposure Draft for this Amendment Rule was undertaken from 17 January to 28 February 2020. People were invited to make written submissions on the draft Amendment Rule to the Department of Industry, Science, Energy and Resources. The Department received 12 submissions.

The submissions were predominantly supportive of the proposed amendments due to the greater flexibility provided to participants. However, a number of technical issues were raised and have been taken into account in the Amendment Rule. In particular, some submissions raised concerns about the interactions between changing project proponents and the rights of native title holders. The Amendment Rule now explicitly requires the Regulator to have regard to the impacts on native title holders when applying tests concerning whether it is appropriate to vary the project proponent and requires the Regulator to inform registered native title body corporates about applications. Other submissions were concerned about the depth of consultation the Regulator would undertake in deciding whether to vary a project proponent. This has been clarified in subsections 24(2B) and 24(2D).

Regulatory impact

The Emissions Reduction Fund White Paper has previously been certified as an Australian Government Regulation Impact Statement for initial decisions on the Emissions Reduction Fund. Those decisions included the Emissions Reduction Fund crediting and purchasing arrangements, Carbon Farming Initiative arrangements incorporated into the Emissions Reduction Fund, and coverage of the Emissions Reduction Fund safeguard mechanism. These minor amendments will not materially change the regulatory impact of the scheme. The Office of Best Practice Regulation has confirmed that a Regulatory Impact Statement is not required.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

ATTACHMENT A

Details of the sections in the *Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020*

1. Name

Section 1 provides that the name of the Amendment Rule is the *Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020*.

2. Commencement

Section 2 provides that the Amendment Rule would commence on the day after it is registered.

3. Authority

Section 3 provides that the Amendment Rule would be made under section 308 of the Act.

4. Schedules

Section 4 provides that the Amendment Rule would, when made, amend the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (the Principal Rule) in the manner set out in the schedules. The power to make rules in section 308 of the Act includes the power to amend or revoke rules that have already been made, with any doubt about this resolved by subsection 33(3) of the *Acts Interpretation Act 1901*.

Schedule 1—Amendments

Item 1: Section 24 Project proponent

Section 24 of the Principal Rule empowers the Regulator (the Regulator) to vary the project proponent on a declaration for an offsets project. It was made for the purposes of section 30 of the Act which empowers the legislative rules to provide for the transfer of a 'project proponent' after the initial declaration of the project as an eligible offsets project. The Amendment Rule repeals and replaces section 24 with an updated set of requirements. Where ever possible the numbering and terms in the previous section have been kept.

The key changes to section 24 are that:

- Instead of applications only being made by a current project proponent, a person not listed as the project proponent can make an application to be listed if they meet one of the eligibility criteria in subsection (2A). This enables projects to continue under the scheme when they may otherwise need to be revoked.
- Greater consultation is required in making decisions under section 24, including notification of registered native title body corporates for area-based offsets projects.
- The Regulator has a residual discretion in approving a transfer such that circumstances could arise where a transfer may not be approved. The exercise of this discretion remains a reviewable decision under Part 24 of the Act. It is intended to

ensure that where a transfer is inappropriate the Regulator is not forced to amend the declaration, taking into account consultation which has occurred.

Changes to subsection 24(1) set out more clearly that where a declaration is being varied to list a new project proponent, the new proponent must be responsible for, and have the legal right to, carry out the project and pass the fit and proper person test. The subsection also recognises that the Regulator must remove a listed project proponent from the declaration if they no longer meet the requirements of being the project proponent as set out in the Act and the application is made by a project proponent listed on the declaration. The existing requirement for security to be provided where it has been sought remains unchanged in paragraph (1)(d).

Consistent with the Principal Rule, subsection 24(2) outlines that an application must be in the approved form, contain contact details and information to identify the relevant project and a declaration that all information provided is accurate. Changes to 24(2) to identify proponents that should be removed and establish why the applicant is eligible will assist the Regulator to verify that the proposed new project proponent meets the requirements and is willing to become the project proponent, and the circumstances around the transfer.

New subsection 24(2A) sets out the people and situations in which they can make an application to the Regulator to vary the project proponent. Under the Principal Rule, only the current project proponent (or legal representative) was able to apply to vary the project proponent. This change would allow projects to continue in broader circumstances including where the project area is sold, the owner of the project area has contracted another person to conduct an offsets project on their land, the individual project proponent has died, or the carbon sequestration right has been assigned to another person. Subsection 24(2A) now allows people that meet the statutory requirements of a project proponent to apply to become the project proponent listed on the declaration when:

- They have written agreement of the listed project proponent (paragraph (c)); or
- The listed project proponent has applied to voluntarily revoke the project (paragraph (d)); or
- One of the following circumstances has occurred to the listed project proponent (paragraph (e)):
    - They cease to exist (e.g. a statutory corporation is abolished);
    - They have abandoned the project (e.g. they may no longer be involved in the activities on the land or have ceased reporting requirements);
    - A court orders the transfer;
    - The person has been found not to be a fit and proper person; or
- The listed project proponent has become insolvent (paragraph (f)). This includes individuals or body corporates that are Chapter 5 body corporates as defined in the *Corporations Act 2001*. However, it would not include corporations under other forms of administration which are not ‘Chapter 5 body corporates’ as defined. The

Regulator must also consider transfer in these circumstances is appropriate, including consideration of whether the applicant's conduct causes, or materially contributed to the insolvency.

- The Regulator is revoking the project and considers that the transfer of the project to the new person is appropriate, including in terms of the new project proponent's conduct (paragraph (g)); or
- The project was declared on or after 1 July 2020, none of the people listed meet the definition of the project proponent and the transfer to the new person is appropriate (paragraph (h)). It is likely that commercial arrangements for the potential failure of a project were addressed during the establishment of the project based on these new requirements.

In the cases of insolvency, unilateral revocation by the Regulator, and projects declared after 1 July 2020 where none of the people listed meet the definition of the project proponent, the Regulator must be satisfied that the transfer is appropriate. The intent is to ensure that the new proponent is coming to the scheme with clean hands and has not undermined the existing project proponent to bring about the transfer. It is important that the person wanting to become the new project proponent has not behaved in a way that has caused the circumstances for the project transfer to occur (sub-subparagraphs (f)(ii)(A), (g)(iii)(A), (h)(iii)(A)). Conversely, listed project proponents who have not met the scheme obligations should not be able to keep carbon abatement activities permanently out of the Emissions Reduction Fund ((sub-subparagraphs (f)(ii)(B), (g)(iii)(B), (h)(iii)(B)). The impact on native title holders of the transfer must also be given consideration for area-based offsets projects, particularly where a new project proponent may undermine the basis upon which consent was provided for undertaking the project ((subparagraphs (f)(ii)(C), (g)(iii)(C), (h)(iii)(C)). The Regulator will also consider any other information it feels is relevant to making a decision (as set out in the last sub-subparagraph of each test),

Under new subsection 24(2B) the Regulator must take appropriate measures to notify registered native title body corporates that hold an eligible interest in some or all of the project area of an area-based offsets project. The native title body corporate will be invited to provide its views on the transfer through a submission. The native title body corporate will have at least 28 days after being notified of the application to provide its submission to the Regulator. This provision acknowledges the special interest native title holders have in the projects undertaken on their land. It is also understand that some situations are likely to require native title body corporates to be given more than 28 days to respond, particularly where consultation process are necessary for the native title body corporate to provide its views on behalf of native title holders of an area.

Under the scheme new project proponents with the legal right to undertake a project are not required to re-obtain consent from eligible interest holders to continue projects. However, the Government recognises that where consent was provided to a person that is no longer undertaking the project and eligible interest holders, such as native title holders, may have views on the proposed new proponent that should be considered in the Regulator's decision. There may also be cases where consent is a necessary part of the legal right to undertake the project and needs to be obtained for the person to be the project proponent as defined.

Under new subsection 24(2C) where an application has been made by a person seeking to become the new project proponent, the Regulator must take appropriate steps to consult the listed project proponents. Subsection 24(2D) sets out that the Regulator will notify the listed project proponents of its proposed decision. Those people will have at least 28 days after being notified of the application to provide a submission to the Regulator. These are important provisions to ensure projects cannot be transferred to a new proponent without the knowledge of all parties involved.

A minor wording change is made to subsection 24(3) to ensure consistency with the CFI Act and clarify the wording of the provision.

The Regulator is required to take all reasonable steps to decide on an application within a timely manner. Under the Principal Rule this was within 90 days after the latter of the application being made – or after further information was provided at the request of the Regulator. New subparagraphs have been added to subsection 24(4) to allow sufficient time for the Regulator to consult native title body corporates and to consider objections received from listed project proponents and native title body corporates. The Regulator will endeavour to make a decision on an application within 90 days after the later of:

- the application being made (subparagraph 24(4)(a)),
- receiving any additional information requested by the Regulator ((subparagraph 24(4)(b)),
- the date included on the notification provided to a native title body corporate (subparagraph 24(4)(c)),
- an objection being made by a native title body corporate (subparagraph 24(4)(d)), or
- an objection being made by the listed project proponent (subparagraph 24(4)(e)).

A decision made after 90 days will not be invalid.

Subsection 24(5) specifies the parties that will be notified once the Regulator has made a decision on varying the project proponent. As the Amendment Rule allows for an application to be made by a proposed new project proponent, an addition has been made to include notification requirements for listed project proponents that are being removed from the declaration. This is to ensure all relevant parties are informed of the Regulator's decision.

Changes to subsection 24(7) allows the variation to the project proponent to be backdated so this can reflect what has been occurring in practice. However, transition to a new project proponent can only occur once the existing project proponent fails to meet the definition of a project proponent, and no earlier.

Item 2: At the end of subsection 29(1)

Section 29 allows for project proponents to voluntarily revoke a declaration of an eligible offsets project where credits have been issued. New paragraph 29(1)(c) has been added to

prevent projects from being revoked and kept permanently out of the Emissions Reduction Fund that have been transferred to a new project proponent. Under this amendment, if the applicant has voluntarily applied to the Regulator to revoke a project, the project will not be revoked if the applicant has been removed as project proponent from the declaration. This ensures that an existing project proponent that has lost the legal right to carry out a project cannot use section 29 to prevent a new project proponent from being listed.

Item 3: After paragraph 29(2)(e)

An application for a voluntary revocation must be made in an approved form. The addition of paragraph 29(2)(ea) will ensure when the Regulator receives an application to voluntarily revoke a project, the project proponent also includes information on and contact details for any other person that meets the definition of a project proponent. The existing project proponent will be best placed to know this information and may commit an offence if they provide false or misleading information about these matters.

Item 4: After subsection 29(2)

Under new subsection 29(2A) the Regulator must endeavour to notify relevant parties, including any landholder it identifies as potentially being eligible project proponents, that it has received a compliant application to voluntarily revoke the project. This new subsection has been added to facilitate eligible people to apply to become the project proponent on the declaration and continue the project.

Item 5: After subsection 29(3)

The Regulator will take reasonable steps to decide on an application in a timely manner. Subsection 29(3A) enables the Regulator to delay making a decision on an application to voluntarily revoke a project if a person has made, or has advised the Regulator that it is considering making, an application to vary the declaration to identify a new project proponent that will continue the project.

Item 6: Subsection 30(1)

Section 30 deals with voluntary revocation for project where no credits have been issued in a similar manner to section 29 (where credits have been issued). This item adds paragraph 30(1)(b) to be consistent with paragraph 29(1)(c).

Item 7: After paragraph 30(2)(ca)

This item adds paragraph 30(2)(ca) to be consistent with the addition of paragraph 29(2)(ea).

Item 8: After subsection 30(2)

This item adds subsection 30(2A) to be consistent with section 29(2A).

Item 9: After subsection 30(3)

This item adds subsection 30(3A) to be consistent with subsection 29(3A).

Item 10: At the end of subsection 33(1)

Section 33 deals with the circumstances where the Regulator may revoke the declaration of a project. This item adds a new paragraph 33(1)(c) to be consistent with subsections 29(2A) and 30(2A). It allows for landholders and other interested persons to be informed of the potential revocation so that they can consider making an application to be listed a project proponent.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020

The *Carbon Credits (Carbon Farming Initiative) Amendment (Variation of Project Proponents) Rule 2020* (the ***Amendment Rule***) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Carbon Credits (Carbon Farming Initiative) Act 2011* (the ***Act***) enables the crediting of greenhouse gas abatement from emissions reduction activities across Australia. Greenhouse gas abatement is achieved either by reducing or avoiding emissions, or by removing carbon from the atmosphere and storing it.

The Amendment Rule allows the transfer of an Emissions Reduction Fund project to a new project proponent where an existing proponent is unable or unwilling to continue the project. It does this by amending the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (the ***Principal Rule***).

Human rights implications

The Amendment Rule does not engage any of the applicable rights or freedoms.

A detailed statement of compatibility of the provisions of the Emissions Reduction Fund is provided in the Explanatory Memorandum for the *Carbon Farming Initiative Amendment Bill 2014*:
https://www.legislation.gov.au/Details/C2014B00129/Explanatory%20Memorandum/Text.

Conclusion

The Amendment Rule is compatible with human rights because it does not limit any human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Hon Angus Taylor MP

Minister for Energy and Emissions Reduction