

# Policy Brief:

## Carbon Rights in Australia and New Zealand

### Australia

#### Introduction

Australia operates under a Federal system of government, with six states with considerable autonomy and two territories. Area of jurisdictional responsibility are defined under the Constitution and the Commonwealth and State governments have separate Parliaments. The right to legislate with respect to land title and natural resources is vested in the states.

In recent years, all Australian states have adopted legislation to define carbon sequestration rights (**CSRs**). The legislation generally recognises sequestered carbon as a property right that can be bought and sold, and protected through registration on land title. However, the approach taken by each state has not been consistent, meaning there is no uniform definition of CSR and they are afforded different proprietary status in different states.<sup>1</sup> The approach adopted by each State is set out in Section 1.3 below and Table 1.

The rationale for adopting CSR legislation stems from the opportunities that were presented by emerging carbon markets in the early 2000s. NSW was the first state to enact legislation to facilitate an emissions trading scheme (**ETS**) - the NSW Greenhouse Gas Abatement Scheme (**GGAS**). As part of GGAS, scheme participants could meet their liability through purchasing and acquitting NSW Greenhouse Abatement Certificates (**NGACs**) created from various abatement activities which included the sequestration of carbon in forests. A Carbon Sequestration Rule was established which provided the legal framework for the creation of forestry NGACs. This rule dealt with matters such as permanence, carbon sequestration modeling and the management of legal rights to land, forest and carbon.

Over the years other states in Australia followed NSW, primarily to accommodate a growing voluntary trading market and an anticipated federal ETS. However, these measures were developed independent of

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<sup>1</sup> The Australian Capital Territory and the Northern Territory do not have CSR specific legislation.

any domestic ETS and do not rely on such a scheme to exist. In addition, some states also saw the benefit that carbon forestry could bring to provide investment in plantations and other environmental plantings to be grown in rural areas not previously considered viable from a wood production perspective alone.

The recurring theme in the Australian states' justification for introducing CSR regimes is to allow the commercial exploitation of carbon sequestration under greenhouse gas reduction schemes which impose long-term permanence obligations. In each instance, the states recognised that to encourage private sector investment in forestry sink projects, it was vital that CSR sellers could unequivocally demonstrate to buyers that they have ownership of the rights being transferred. Furthermore, to meet permanence obligations, a CSR must "run with the land" rather than being enforceable only against the original grantor of the right.

In Australia, these objectives are best met via legislation. Under the Torrens title system in place in Australia, the register of land holdings maintained by each state is conclusive as to ownership. The general rule is that, where dealings in land conflict, priority is determined according to the date of registration. Accordingly, the ability to register a CSR on land title has a number of benefits:

- (a) It puts anyone who wishes to deal in an interest in the land (purchasers, mortgagees, and so forth) on notice that the CSR exists;
- (b) It runs with the land – that is, unless the holder of the CSR terminates the CSR, future owners of the land are bound to recognise the holder's entitlement to sequestered carbon; and
- (c) It provides assurance to purchasers and government regulators that they are dealing with the entity that is properly entitled to create and sell carbon arising from a plantation activity on a particular piece of land.

This last point is particularly important in commercial forestry projects and community forestry projects in which a number of diverse entities may have some entitlement to the land and the trees.

## Federal Requirements

In 2011 the Australian Federal Parliament enacted the *Carbon Credits (Carbon Farming Initiative) Act 2011* (C'th) (**CFI Act**) establishing a scheme whereby landholders may establish carbon abatement and sequestration projects that generate tradable carbon credits - the Carbon Farming Initiative or CFI.

The person proposing the project (**Project Proponent**) must have the legal right to carry out the project and, for sequestration projects, they must hold the CSR.

Applicable CSRs are defined in s.43 of the CFI Act. Relevantly, a person must, as a result of holding a registered estate or interest, have the

exclusive legal right to obtain the benefit (whether present or future) of the sequestration of carbon in the relevant carbon pool on the area of land. This right may rest with a landholder or may be separated from land and transferred to a third party. Satisfying these two requirements will ensure that the project qualifies as an Eligible Offset Project under the CFI.

The CFI Act contemplates these rights being registered under relevant State or Territory legal frameworks. Section 1.3 below and **Annexure 1** set out the various types of CSRs that can be created in each of the Australian States. As noted above, significant variation exists between the legislative treatment of CSRs of the States, and the Northern Territory and Australian Capital Territory do not currently afford any mechanism for the registration of CSRs.

A Project Proponent will be responsible for the management of the project and any liabilities arising in relation to it. The Project Proponent is therefore primarily responsible for any permanence obligations including obligations to relinquish carbon units (known as Australian Carbon Credit Units or ACCUs) if direct to do so by the Regulator (for example if there is a deliberate reversal event). Where a relinquishment requirement is not complied with, or is unlikely to be complied with, the Administrator may declare that a project area is subject to a Carbon Maintenance Obligation<sup>2</sup>.

A Carbon Maintenance Obligation declaration can specify 'permitted carbon activities' which may be undertaken on the project area. The declaration may restrict the area of land, method, time or period in which the permitted carbon activity may be carried out or the persons who may carry out the permitted carbon activity<sup>3</sup>. The declaration will specify a benchmark storage level below which the level of sequestered CO<sub>2</sub> must not fall. It is an offence for any person to engage in conduct that results or is likely to result in a reduction below the benchmark sequestration unless the conduct has been expressly permitted as a 'permitted carbon activity' in the declaration.

In addition to the Project Proponent, landowners and occupiers of land the subject of Carbon Maintenance Obligations have an obligation to take 'all reasonable steps' to restore carbon levels where they fall below a benchmark level. The Carbon Maintenance Obligation can be registered on the title to the land<sup>4</sup> and will remain in place until any outstanding monetary penalty has been paid or, if it is not paid, for 100 years after the first ACCUs were issued for a project or for 100 years after a new project area is added to the project.<sup>5</sup> Alternatively, the obligation will be lifted on relinquishment to the Administrator of such a number of ACCUs as equals the number of credits that have been issued in respect of the project<sup>6</sup>.

Where the declaration of a Carbon Maintenance Obligation is noted on the title to the land it will operate similarly to a restrictive covenant and will bind future purchasers of the land.

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<sup>2</sup> *Carbon Credits (Carbon Farming Initiative) Act 2011* s97

<sup>3</sup> *Carbon Credits (Carbon Farming Initiative) Act 2011* s97(4)

<sup>4</sup> *Carbon Credits (Carbon Farming Initiative) Act 2011* s97(6)

<sup>5</sup> *Carbon Credits (Carbon Farming Initiative) Act 2011* s97(14)

<sup>6</sup> *Carbon Credits (Carbon Farming Initiative) Act 2011* s99

## State Based Measures

### 1. New South Wales

#### 1.1 Freehold Torrens Title

In New South Wales a CPR over freehold Torrens title is created as a Carbon Sequestration Right (**CSR**) under the *Conveyancing Act 1919 (NSW)* (Act), as a form of “forestry right”.

A CSR is defined as, in relation to land, a right conferred on a person by agreement or otherwise, to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land after 1990. Carbon sequestration is defined as the process by which the tree or forest absorbs carbon dioxide from the atmosphere.<sup>7</sup>

A forestry right is a deemed profit a prendre under the Act and is defined by s 87A as:

- (a) an interest in the land pursuant to which a person having the benefit of the interest is entitled:
  - (i) to enter the land and establish, maintain and harvest (or to maintain and harvest) a crop of trees on the land; or
  - (ii) to enter the land and establish, maintain and harvest (or to maintain and harvest) a crop of trees on the land and to construct and use such buildings, works and facilities as may be necessary or convenient to enable the person to establish, maintain and harvest the crop; or
- (b) a carbon sequestration right in respect of the land; or
- (c) a combination of the interest and right referred to in paragraphs (a) and (b).

A forestry right under paragraph (a) of the definition is referred to as a “forestry right (timber)”. A forestry right under paragraph (b) of the definition is referred to as a “forestry right (carbon sequestration)”.

While it is possible to register the forestry right (carbon sequestration) alone, good practice dictates that, if possible, the forestry right (timber) be registered at the same time.

It is preferable to register the two types of forestry right in conjunction because there is an argument that without the forestry right (timber), the forestry right (carbon sequestration) does not give sufficient ancillary rights for the owner of the CPR to enter onto the land and plant trees which may be required to sequester carbon. Although such ancillary rights may be given in a carbon covenant, set out an annexure to agreement granted the forestry right (carbon sequestration), there is a possibility that these rights may merely be contractual and will not run with the land. However, this argument has never been tested.

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<sup>7</sup> *Conveyancing Act 1919 (NSW)* s 87A

The Act also allows for the registration of forestry covenants. A forestry covenant is defined under section 87A as a covenant that is incidental to a forestry right and includes any such covenant that imposes obligations requiring:

- the construction and maintenance of access roads within the land;
- the erection and maintenance of fencing on the land;
- the provision and maintenance of water supplies within the land;
- the provision of access to or the maintenance of trees or forests on land that is the subject of any carbon sequestration right;
- the ownership of any tree or trees on land that is the subject of a forestry right to be vested in the person who owns the forestry right; or
- imposes any term or condition with respect to the performance of or failure to perform any such obligation.

A forestry covenant only has effect while the forestry right to which it relates, continues.<sup>8</sup>

The usual practice is to register both a forestry right and a forestry covenant to enable, for example, the provision of access to or the maintenance of trees or forests on land that is the subject of any CSR. The forestry covenant also enables the ownership of any trees on the land that is the subject of a forestry right to be vested in the person who owns the forestry right. So although not owning the land, the holder of a forestry right and forestry covenants may own both the CSR as well as the trees themselves.

## 1.2 General Law Land

A forestry right and forestry covenant can be registered as a Deed on general law land<sup>9</sup> and the provisions of the Act have the same effect on general law land as on Torrens land (see discussion at paragraph 1.1 above).

## 1.3 Leasehold Land

The Crown Lands Act 1989 (NSW) and the Western Lands Act 1901 (NSW) both permit the registration of forestry rights (including CSR's) on all leasehold land in NSW. The process of registration of a forestry right over leasehold land is very similar to the freehold process discussed below, except that the Minister administering the Crown Lands Act 1989 (NSW) or Minister administering the Western Lands Act 1901 (NSW) (depending on which statute governs the land) will be required to either consent to the dealing (where the leasehold estate is a perpetual lease) or grant the forestry right (where the leasehold estate is not a perpetual lease). However, the Minister administering the Crown Lands Act 1989 (NSW) or Minister administering the Western Lands Act 1901 (NSW) (depending on which statute governs the land) must consult the Minister administering the [Forestry Act 2012](#) before granting a forestry right in respect of Crown

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<sup>8</sup> *Conveyancing Act 1919* (NSW) s 88EA(8).

<sup>9</sup> *Conveyancing Act 1919* (NSW) s 88EA.

land that is Crown-timber land within the meaning of the [Forestry Act 2012](#).<sup>10</sup> In the case of Crown-timber land that is a State forest or timber reserve, it is the Forestry Corporation that may grant a forestry right in respect of the land.<sup>11</sup>

## 2. Queensland

Recent amendments to the *Land Title Act 1994* (**Land Title Act**) and *Land Act 1994* (**Land Act**), introduced to meet certain requirements under the Federal Government's Carbon Farming Initiative, allow Carbon Abatement Interests to be registered on the Land Title Register,<sup>12</sup> which will give a grantee of a Carbon Abatement Interest the exclusive right to any economic benefit associated with the carbon sequestration of the land.<sup>13</sup>

Carbon Abatement Interests permit a grantee to execute an eligible sequestration project in relation to Carbon Abatement Products on land in Queensland under the Carbon Farming Initiative. Carbon Abatement Products include living biomass, dead organic matter and soil.

A Carbon Abatement Interest runs with the land, and is registered as an 'interest' on the relevant parcel of land, similar in effect to an easement document.

The Land Act and Land Title Act have been amended to provide for:

- the creation of a carbon sequestration interest in land (which includes exclusive right to the benefit of carbon sequestration in a specific area); and
- further dealings with carbon sequestration interests.<sup>14</sup>

Under the amendments to the Land Title Act, a Carbon Abatement Interest will be created by registering the document creating the Interest in the Titles Office. This involves completing the *Titles Registry Form 36 - Carbon Abatement Interest*. The supporting document will also need to include:

- a description identifying the lot the subject of the Interest;
- the terms of the Interest being granted;
- the period for which the Interest is granted; and
- a sketch plan identifying the relevant part the lot (if the Carbon Abatement Interest relates to part of a lot).

Registration will only occur if:

- the proposed grantor of the Interest is the registered owner of the lot;
- the registrar is satisfied that the registered owner is the holder of the right to deal with the carbon abatement product for the lot;

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<sup>10</sup> *Crown Lands Act 1989* (NSW) s 59C(8) and *Western Lands Act 1901* (NSW) s 35X(6).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Land Act 1994* (Qld) s 373S(1) and *Land Title Act 1994* (Qld) s 970(1).

<sup>13</sup> *Land Act 1994* (Qld) s 373R and *Land Title Act 1994* (Qld) s 97N.

<sup>14</sup> *Ibid.*

- all holders of registered interest in the land (i.e. the mortgagee), whose interest may be affected by the proposed Carbon Abatement Interest, consent to the grant of the Interest; and
- there are no existing Carbon Abatement Interests registered for the part of the lot to which the proposed Interest relates.<sup>15</sup>

The grantor and the grantee of a Carbon Abatement Interest may be the same person, making it possible for a land owner to grant a Carbon Abatement Interest to itself and then transfer that Interest to a different party at a later date.<sup>16</sup>

Similar amendments to the Land Act have been made, with provisions requiring the relevant Minister to consent to the creation of a Carbon Abatement Interest in relation to the land governed by the Land Act<sup>17</sup>. In deciding whether to consent to the registration of an Interest, the relevant Minister must consider whether the land will or is likely to be used or dealt with in a way that is inconsistent with the proposed Interest.<sup>18</sup>

A Carbon Abatement Interest may not be registered for any specified national park that is on the Freehold Land Register.<sup>19</sup>

The registration of a Carbon Abatement Interest alone in the Queensland Land Titles Office will not entitle a project to be approved as a carbon offset project, as certain criteria must first be met under the Carbon Farming Initiative before the project will be approved.

There are also provisions dealing with amendments to an Interest and the mechanisms involved in surrendering an Interest.<sup>20</sup>

### 3. South Australia

In South Australia CPRs are able to be created under the *Forest Property Act 2000* (SA) (**Act**) (as amended by the *Forest Property (Carbon Rights) Amendment Act 2006* (SA), which commenced on 1 July 2007), and are called Forest Property Agreements (**FPA**).

Under the Act, two types of FPA may be created:

- forest property (vegetation) agreement (**FPVA**); and
- forest property (carbon) agreement (**FPCA**).<sup>21</sup>

A FPVA gives the owner of the agreement rights to the “forest vegetation” on the land. Section 3 of the Act defines forest vegetation as ‘trees and other forms of forest vegetation including roots or other parts of the trees or other forest vegetation that lie beneath the soil and leaves, branches or other parts or products of trees or other forest vegetation’. A FPCA, on the other hand, gives the owner of the agreement rights to the carbon sequestered by the forest vegetation on the land.

<sup>15</sup> *Land Title Act 1994* (Qld) s 97P.

<sup>16</sup> *Land Title Act 1994* (Qld) s 97Q.

<sup>17</sup> *Land Act 1994* (Qld) s 373T.

<sup>18</sup> *Land Act 1994* (Qld) s 373T(2).

<sup>19</sup> *Land Title Act 1994* (Qld) s 97R.

<sup>20</sup> *Land Act 1994* (Qld) ss 373X, 373Y and *Land Title Act 1994* (Qld) ss 97S, 97U.

<sup>21</sup> *Forest Property Act 2000* (SA) s 5(1).

By operation of section 3A(2) of the Act, ownership of the sequestered carbon attaches to the forest vegetation sequestering such carbon. Therefore entry into an FPVA will give the owner of the forest vegetation ownership of the carbon as well, without the necessity for a separate grant of an FPCA. The FPCA therefore seems to be a mechanism allowing the separation of ownership of the carbon sequestered by the forest vegetation from the forest vegetation itself.

The Act applies to carbon rights in respect of carbon sequestered in the past as well as present sequestration during the term of the FPCA.<sup>22</sup>

A FPCA (and FPVA) may under section 6(2) of the Act, contain the following provisions:

- requirements or restraints in relation to the establishment, maintenance and harvest or other removal of forest vegetation;
- access to the land;
- the duties of care of both the land owner and the owner of the FPCA; and
- any other incidental matters.

Under the Act, a FPCA (and FPVA) is deemed to be a chose in action, which is a personal right only.<sup>23</sup> While this would normally mean that the FPCA (although registered on title to the land), would be defeated by subsequent owners of the land, section 7(3) and section 9 of the Act ensure that the FPCA, if registered on title, is enforceable against the world at large (in the same way that proprietary interests such as registered leases, are enforceable against the world at large).

#### 4. Tasmania

In Tasmania, CPRs can be created as Carbon Sequestration Rights (**CSR**) under the *Forestry Rights Registration Act 1990* (Tas) (**Act**), as a form of “Forestry Right”.

A CSR is defined as a right conferred on a person (by agreement or otherwise) to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land.<sup>24</sup>

Further, a Forestry Right is defined as any of the following interests in the land (or combination of such interests) granted by the land owner:

- ownership of trees;
- a carbon sequestration right;
- a right to establish, maintain or harvest, or maintain and harvest, trees,

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<sup>22</sup> *Forest Property Act 2000* (SA) s 3A(3).

<sup>23</sup> *Forest Property Act 2000* (SA) s 3A(1).

<sup>24</sup> *Forestry Rights Registration Act 1990* (Tas) s 3.

together with:

- any ancillary rights of access or of constructing or using tracks, culverts, bridges, buildings or other works or facilities in connection with the enjoyment of the interest, whether or not those ancillary rights are coupled with obligations; and
- any provisions for charges, payments or royalties or for the division of trees or the proceeds of trees, whether or not those provisions are coupled with obligations.<sup>25</sup>

A Forestry Right is also deemed to be *profit à prendre* under section 5 of the Act.

As in New South Wales, good practice dictates that a forestry right over land should include all rights available under paragraphs (a), (b) and (c) of the definition of Forestry Right.

The Act also allows for the registration of forestry covenants. Again, similar to New South Wales, a forestry covenant is a covenant (whether positive or restrictive) which is incidental to a forestry right.

#### 4. Victoria

##### **Carbon Property Rights over Torrens Land and General Law Land**

In Victoria, CPRs are recognised as a statutory right under the *Climate Change Act 2010* (Vic) ("**CC Act**") which establishes the framework for the ownership CPRs.

As with other States, in Victoria the ownership of a carbon sequestration right can be separated from the ownership of the forest itself.

Under the CC Act three proprietary interests may be created, collectively called 'Forest Carbon Rights' (**FCR**):

- a *carbon sequestration right* – the right to commercially exploit carbon sequestered by vegetation on the land;
- a *forestry right* – the right to plant, establish, manage and maintain vegetation on the land, coupled with rights to access the land; and
- a *soil carbon right* – the right to commercially exploit carbon sequestered underground, excluding carbon sequestered in plants.<sup>26</sup>

Each FCR is able to be registered on title to the land, and acts to bind successive landowners, or persons with an interest in that land.<sup>27</sup>

All FCRs must:

- be created by the registered proprietor of the land;
- be in a form approved by the Victorian titles office;

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<sup>25</sup> Ibid.

<sup>26</sup> *Climate Change Act 2010* (Vic) ss 3A, 3B, 3C and 3D.

<sup>27</sup> *Climate Change Act 2010* (Vic) s 26.

- specify each Forestry Carbon Right that is being created (i.e. carbon right, forestry right or soil carbon right);
- they must express that they are created in accordance with the CC Act.<sup>28</sup>

Part 4, Division 3 of the CC Act provides for a landowner, the owner of a forestry carbon right and any other person to enter into a Forestry and Carbon Management Agreements (**FCMA**) to set out the management obligations of the parties in relation to management of carbon sequestration by vegetation or underground, and the management of vegetation.<sup>29</sup> The CC Act stipulates that a FCMA must specify the person entitled to control decisions in relation to the timing and extent of harvesting (as well as a process outlining such decisions), and obligations agreed by the parties in relation to the preservation, enhancement or management of vegetation or soil.<sup>30</sup> FCMA's may also contain any other provisions agreed between the parties.<sup>31</sup> The CC Act also provides that FCMA's may require the owner of the forestry carbon right to pay the land owner a "bond", which is then returned at the time specified in the FCMA.<sup>32</sup>

FCMA's can then be registered on title to the land, and bind any person with a subsequent interest in the land.<sup>33</sup>

The CC Act also provides that while some variations can be made to FCMA's other variations are prohibited, including a variation to the parties to the agreement, the land to which the agreement applies or the end date of the agreement.<sup>34</sup> Further, no more than one FCMA can be registered over the same area of land.<sup>35</sup> These restrictions may, in practice, make it difficult for a landowner to grant one person a forestry right over land, and another person a carbon sequestration right over the same land at a later date. If the owner of the forestry right has a registered FCMA with the landowner, then the owner of the carbon sequestration right will not be entitled to their own FCMA, nor will they be able to become a party to the forestry right FCMA due to these restrictions in the Act..

Whether these difficulties are averted will depend largely on whether a forestry carbon right can set out the rights and obligations of the parties in the relevant right. If so, then it is envisaged that a FCMA would only be used in circumstances where a landowner granted two or more types of forestry carbon right over the same area, and then each owner of the relevant forestry carbon right and the landowner would enter into a joint FCMA detailing how the parties intended to manage their respective rights. If however, it is intended that the new forestry carbon rights system will operate in the same way as the NSW and WA regime work (where the right is merely granted, and the obligations and rights of the parties relating to that right are set out in a separate covenant) and the

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28 Ibid.

29 *Climate Change Act 2010* (Vic) ss 27, 28.

30 *Climate Change Act 2010* (Vic) s 29(1).

31 *Climate Change Act 2010* (Vic) s 29(2).

32 *Climate Change Act 2010* (Vic) s 30.

33 *Climate Change Act 2010* (Vic) ss 32, 33.

34 *Climate Change Act 2010* (Vic) s 34.

35 *Climate Change Act 2010* (Vic) s 27(4).

FCMA is intended to be the only agreement under which the parties can set out their respective rights and obligations, then practical problems with the Victorian regime may ensue.

### **Carbon Property Rights over Crown Land**

Under the CC Act, the Crown is entitled to grant to a third party a carbon sequestration right or soil carbon right.<sup>36</sup> This grant is made under a Carbon Sequestration Agreement.<sup>37</sup> FCRs cannot be made in relation to unalienated Crown land, reserved Crown land, or Crown land subject to a lease under the Transfer of Land Act 1958.<sup>38</sup> Only Crown land which is the subject of certain Victorian legislation, or which has been made available for carbon sequestration purposes by order of the Governor-in Council can be the subject of a Carbon Sequestration Agreement.<sup>39</sup> The Crown is also able to invite expressions of interest for the development of land as a carbon sink.<sup>40</sup>

A Carbon Sequestration Agreement may authorise a person to:

- access, plant and maintain vegetation on Crown land;
- control and exploit the sequestered carbon within the vegetation and soil; and
- manage the land.<sup>41</sup>

The CC Act also provides that the Secretary of the Department of Sustainability and Environment may specify further requirements for Carbon Sequestration Agreements, including, among other things, the contents of such agreements, as well as requirements for management plans, to be included in agreements.<sup>42</sup> Carbon Sequestration Agreements are also able to contain provisions relating to:

- fire management obligations;
- security, insurances and indemnities;
- termination;
- variation;
- compensation entitlements; and
- rehabilitation of land.<sup>43</sup>

The CC Act sets up a registration system for Carbon Sequestration Agreements, which is to be kept by the Secretary of the Department of Sustainability and Environment.<sup>44</sup>

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<sup>36</sup> *Climate Change Act 2010* (Vic) s 47.

<sup>37</sup> *Climate Change Act 2010* (Vic) s 45.

<sup>38</sup> *Climate Change Act 2010* (Vic) s 20.

<sup>39</sup> *Climate Change Act 2010* (Vic) s 42.

<sup>40</sup> *Climate Change Act 2010* (Vic) s 42(1)(c).

<sup>41</sup> *Climate Change Act 2010* (Vic) s 47(1)(b).

<sup>42</sup> *Climate Change Act 2010* (Vic) s 46.

<sup>43</sup> *Climate Change Act 2010* (Vic) ss 47(1)(d), 48, 55, 47(1)(e).

<sup>44</sup> *Climate Change Act 2010* (Vic) s 56.

## 5. Western Australia

In Western Australia CPRs are recognised as a statutory right under the *Carbon Rights Act 2003* (WA) (Act).

The Act deals with CPRs in two ways:

- it allows for the registration of a “Carbon Right” which is a registrable entitlement to the legal and commercial ownership in relation to changes to the atmosphere arising as a result of carbon sequestered or released by the land the subject of the (**Carbon Right**;) and
- an owner of a Carbon Right may also register a “Carbon Covenant” over the area of land affected by the Carbon Right. A carbon covenant may be in relation to any matter which affects or might affect carbon sequestration or release in relation to the land affected by the Carbon Right, and include rights and obligations and restrictions in relation to the land (**Carbon Covenant**).<sup>45</sup>

A Carbon Covenant must always be owned by the person who owns the related Carbon Right over the land.<sup>46</sup>

Although a Carbon Right and Carbon Covenant are registered separately, a Carbon Right relates primarily to the ownership of sequestration, while the Carbon Covenant sets out the agreement between the land owner and the owner of the Carbon Right in relation to various ancillary rights. For example, a Carbon Covenant will deal with access to the land, the establishment and ownership of vegetation, maintenance of vegetation, etc. As such, in most circumstances, it would be advisable for a person acquiring a Carbon Right, to acquire and register a Carbon Covenant at the same time.

The Act differs from other States in that it is not solely related to carbon sequestered by vegetation on the land, rather it applies to any sequestration occurring on the land, whether by vegetation or some other means, such as soil sequestration.

Carbon Rights and Carbon Covenants are created on registration of the interests on title to the relevant land.<sup>47</sup>

No more than one Carbon Right may be created at any particular time in respect of the same area of land however,<sup>48</sup> the land owner can also be the owner of a Carbon Right and a Carbon Covenant under the Act.<sup>49</sup>

## 6. Northern Territory

Currently, neither the Australian Capital Territory nor the Northern Territory provides for any form of Carbon Property Right to be registered as an interest in or on title to the land.

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<sup>45</sup> *Carbon Rights Act 2003* (WA), ss 8, 10.

<sup>46</sup> *Carbon Rights Act 2003* (WA) s 14(2).

<sup>47</sup> *Carbon Rights Act 2003* (WA) ss 6, 12.

<sup>48</sup> *Carbon Rights Act 2003* (WA) s 7(2).

<sup>49</sup> *Carbon Rights Act 2003* (WA) s 12(3)(a).

The Northern Territory is developing legislation. However, it is unclear as to when this will be introduced.

In the absence of such laws the Northern Territory may consider bespoke arrangements through individual agreements with individual project developers. The only alternative is that under the existing law a profit à prendre for general access to a land owner's land is registrable. However, the registration of such interest is very rare. It may be possible for a Carbon Property Right to be registered as a general profit à prendre, however, it is likely that the process would be costly as this type of profit à prendre is not recognised in the Northern Territory.

## **7. Australian Capital Territory**

Similarly to the Northern Territory, there is currently no such proprietary interest like a carbon sequestration right or forestry right to be registered in or on title in the Australian Capital Territory. Discussions regarding establishing such interests as separate proprietary rights have been going for some time at the departmental level of the Australian Capital Territory government and are unlikely to be resolved in the near future.

In the absence of such laws, an agreement between a landowner and an alternate "owner" of the carbon on the land can be set out as part of the development application for planning approval for a project. The ultimate approval for a project may then be registered as an "administrative instrument" on title. It is not registered on title, but is rather an instrument which is incorporated on title. This means that it is not guaranteed by the titles office as it would otherwise be.

# New Zealand

## Introduction

New Zealand is a unitary state, rather than a federation. Similar to the Australian legal system, New Zealand's land and property laws derive from the common law and the UK's Westminster system. Accordingly, New Zealand has established a Torrens Title system where general land is owned by private individuals or corporations and is held in fee simple, with title registered by Land Information New Zealand. Special recognition is provided for Maori land in the Maori Land Act 1993, where land may either be held as customary land or converted to general land for private ownership.

## NZ ETS

In September 2008 the New Zealand Government finalised the legislative framework to implement a New Zealand Emissions Trading Scheme (NZ ETS). The purpose of the scheme is to assist New Zealand to reduce its emissions below business as usual level and help New Zealand meet its international obligations under the UNFCCC and Kyoto Protocol.<sup>50</sup> The NZ ETS was introduced into law by amendments to the *Climate Change Response Act 2002*.

The NZ ETS allows sales to and purchase from international trading markets and allows a wide range of units to be used for compliance in the scheme. The primary unit of trade for the emissions trading scheme is the New Zealand unit (NZU), which is the unit created and distributed by the Government.<sup>51</sup> The ETS provides incentives for increased tree planting by passing the carbon units earned under the Kyoto Protocol to forest owners. The ETS also creates price signals for deforestation – the conversion of forest land to other land uses. For these reasons, forestry was the first sector to enter the ETS. Participation in the ETS is compulsory where sector specific emissions are exceeded.<sup>52</sup>

Forest land<sup>53</sup> is included in the NZ ETS in two ways:

1. Pre-1990 forest land (ie land that was in exotic forest immediately prior to 1990 and remained in exotic forest immediately prior to 2008) is included in the NZ ETS on a mandatory basis when it is deforested (unless that land is exempt from inclusion in the NZ ETS)<sup>54</sup>;

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50 New Zealand has committed to a non-binding target of reducing greenhouse gas emissions to 5% below 1990 levels by 2020. This commitment is made under the UNFCCC, New Zealand having opted out of the Kyoto Protocol.

51 One NZU is equivalent to one tonne of carbon dioxide equivalent emissions.

52 Ministry of Agriculture and Forestry (May 2011), Forestry in the Emissions Trading Scheme, <http://www.mpi.govt.nz/news-resources/publications>.

53 defined as an area at least one hectare in size that contains forest species and has or is likely to have trees covering 30 percent of each hectare

54 A pre-1990 forest landowner could apply for an exemption from the scheme until a date to be prescribed by regulation or public notice if the total area owned by the person who owned the land as at 1 September 2007 (with any associated persons) was less than 50 hectares, or if the deforestation involves trees designated as weeds.

2. Post-1989 forest land (ie forests planted after 1989 on non-forest land) is to be included in the NZ ETS on a voluntary basis (ie landowners or other authorised persons can opt-in for inclusion in the NZ ETS)<sup>55</sup>.

Indigenous forests established before 1990 are completely excluded from the ETS. The carbon stocks of these forests are considered to be in a steady state overall, so New Zealand does not earn carbon credits for them internationally under Kyoto Protocol rules.

Post-1989 forest land is brought into the ETS by applying to be registered as a participant with respect to that forest land. However, owners of pre-1990 forest land automatically become participants in the ETS if they deforest more than two hectares of non-exempt forest land in any five year period, starting 1 January 2008. Post-1989 forest land is eligible to earn NZUs for carbon sequestered from 1 January 2008. Participation with exotic or indigenous post-1989 forest land is voluntary. If the land is not registered, the change in carbon stocks defaults to the Crown.<sup>56</sup>

Where forest land is covered by the ETS, if deforestation occurs (defined as forest clearance followed by a change in land use out of forestry or the replanting or regeneration of forest species not meeting certain thresholds), subject to limited exemptions (such as minor clearing, minimum clearing in a five year period and natural disturbances), forest owners are required to file an emission return and pay units to meet their emissions liability.

## PFSI

Operating in parallel to the NZ ETS is the Permanent Forest Sinks Initiative (PFSI) which is established through the *Forests (Permanent Forest Sink) Regulations 2007* which is established under the Forests Act 1949. The PFSI promotes the establishment of permanent forests on un-forested land by offering landowners of permanent forests established after 1 January 1990 the opportunity to earn emission units for the carbon absorbed by their forests since 1 January 2008.

PFSI participants enter a covenant with the Crown which is registered against their land title(s). The covenant is in perpetuity, with the right to terminate after a minimum term of 50 years. Landowners are responsible for establishing and maintaining the forest. Limited harvesting is allowed on a continuous cover forestry basis. Harvesting restrictions will be removed after 99 years.

The rights and liabilities under the PFSI run with the land and obligations will remain in perpetuity, unless the Government agrees to vary the contract with the landowner. If for any reason, the amount of carbon stored in a forest decreases, the landowner will be required to “replace” emission units for the CO<sub>2</sub> released back into the atmosphere by

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<sup>55</sup> *Climate Change Response Act 2002*, Sch 4, s 54.

<sup>56</sup> Ministry of Agriculture and Forestry, *Forestry in the Emissions Trading Scheme* (May 2011) Emissions Trading Scheme Guidelines p8.

surrendering an equivalent number of units from the NZ ETS. In addition, landowners who deliberately breach harvesting restrictions will be required make a penalty payment.

### Forestry Rights Registration Act 1983

In New Zealand, a right to certain compliance credits arising from the carbon sequestered in certain forests can be created under the Forestry Rights Registration Act 1983 (**FRRA**).

As a starting point, in the absence of legislation or private arrangements to the contrary, the owner of the land will own carbon sequestered on that land, as such carbon forms part of the land. In particular, the general rule at common law is that the owner of land is presumed to be “the owner of everything up to the sky and down to the centre of the earth”.<sup>57</sup> While there are numerous exceptions to this rule, including with respect to airspace, minerals, geothermal energy and water, none of these exceptions detract from the landowner’s ownership of carbon on the land.

The FRRA establishes a mechanism whereby the proprietor of the freehold or leasehold land may grant a forestry right with respect to that land, either to him/herself, or a third party. Under the FRRA, the proprietor and the grantee (or holder) of the forestry right enter into a forestry covenant detailing the rights and obligations of each party under that forestry right. Under section 4, every forestry covenant shall be binding on assignees. So long as the forestry covenant meets the requirements set out in the FRRA, that forestry right can be registered against the title to that land under the *Land Transfer Act* 1952.

Under section 3, a ‘forestry right’ is deemed to be a profit-a-prendre. It is a non-possessory interest in land which gives the holder the right to establish, maintain and harvest a crop of trees on the relevant land.

Under section 2A(2)(b), the forestry right may also provide for “charges, payments, royalties, or division of the crop or the proceeds of the crop including units based on carbon sequestration that are received in accordance with a forest sink covenant”.

The terms ‘units’ and ‘forest sink covenant’ referred to in this section are Assigned Amount Units (**AAUs**) derived from forest sink covenants created under the Crown’s PFSI and NZUs issued under the NZ ETS.<sup>58</sup>

In summary, the owner of the land has the right to grant a forestry right to a third party for the sharing of profits in the crop (ie. the carbon units). The forestry covenant would simply need to grant a right to the holder to share in any value derived from carbon sequestration, as those proceeds could be considered either ‘payments, royalties or proceeds of the crop’ in accordance with section 2A(2)(b). There is nothing in the FRRA which prevents such provision from being included in any forestry covenant. Furthermore, there is nothing in the FRRA which prevents a forestry right

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57 *Corbett v Hill* [1870] LR 9 Eq at 673 per James V-C

58 See [www.maf.govt.nz/forestry/pfsi/](http://www.maf.govt.nz/forestry/pfsi/).

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from setting out the details as to how the forest is to be best managed to ensure that the greatest amount of carbon is possibly sequestered over the term of the agreement.

The forestry right would also need to account for the maintenance of the relevant crop to ensure permanence of the sequestration activity, namely the forest would need to remain standing in perpetuity. That forestry right could then be registered against the title on the computer freehold registry and would therefore put any third party dealing in the relevant land on notice that the land is subject to a restrictive forestry right. Once registered, the forestry right would bind any new owner of the relevant land as forestry rights run with the land.

## Annexure 1

### Australian State and Territory Comparison of Carbon Sequestration Rights

#### New South Wales

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
<p>Conveyancing Act 1919 (NSW)</p> <p>Crown Lands Act 1989 (NSW)</p> <p>Western Lands Act 1901 (NSW)</p>	Forestry Right and Forestry Covenant	Yes	Yes	Yes	Yes	<p>Department of Lands (Land and Property Information) (LPI)</p> <p>1 Prince Albert Road Queen's Square Sydney NSW 2000 Ph: (02) 1300 052 637 Website: <a href="http://www.lpi.nsw.gov.au/">http://www.lpi.nsw.gov.au/</a></p>	<p>The transfer form creating the forestry right (Number 01TH), the forestry covenant and survey plan, must be completed and lodged at the LPI. Consents from any persons who own an encumbrance over the relevant land must also be obtained and the certificate of title must also be produced. Documentation must then be lodged with the Office of State Revenue for stamping.</p> <p>The process for leasehold land is the same except the consent of the relevant Minister must be obtained for perpetual leases and the consent of the lessee of the land must be obtained for land that is not held under a perpetual lease.</p> <p>For general law land, a deed must be registered with a certified copy of the original executed forestry right and forestry covenant deed attached.</p>	<p>Where the Right is taken over part of the property a full survey plan will be required and in some circumstances, must be lodged as a separate deposited plan.</p> <p>If a separate survey map is registered as a distinct deposited plan, an additional minimum fee of \$1045.00 is payable.</p>	Stamp duty is no longer payable on Forestry Rights in NSW

## Queensland

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
Land Act 1994 (QLD) ; Land Title Act 1994 (QLD)	Carbon Abatement Interest	Yes	Yes	Yes	Yes	Department of Natural Resources and Mines  Level 11, 53 Albert Street Brisbane QLD 4000 Ph: (07) 3405 6900 Fax:(07) 3225 1739 Web site: <a href="http://www.nrm.qld.gov.au/property/index.html">http://www.nrm.qld.gov.au/property/index.html</a>	A Carbon Abatement Interest will be created by completing the Titles Registry <i>Form 36 - Carbon Abatement Interest</i> .	The Registrar of Titles requires a surveyed plan to accompany an application to register a Carbon Abatement Interest if the Carbon Abatement Interest is in relation to part of a lot.  The survey plans may not be lodged digitally.  An additional lodgment fee of \$266 (plus \$20.30 for each lot) is required to be paid to the land Registry Office for the lodgment of the Form 21 survey plan.	Stamp duty will be payable in Queensland under the <i>Duties Act 2001</i> (Qld).

## South Australia

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
Forest Property Act 2000 (SA)	Forest property (vegetation) agreement (FPVA) and Forest property (carbon) agreement (FPCA).	No, but is protected against subsequent registered interests under the Forest Property Act	Yes	Yes	Yes	<p>Land Services Group, Government of South Australia (Land Titles Office)</p> <p>Level 2, 101 Grenfell Street, Adelaide SA 5000 Ph:(08) 8226 3983 Fax:(08) 8226 3998 Email: <a href="mailto:dtei.lsgfeedback@sa.gov.au">dtei.lsgfeedback@sa.gov.au</a> Website: <a href="http://www.landservices.sa.gov.au">http://www.landservices.sa.gov.au</a></p>	<p>The registration process for an FPA over Torrens land and leasehold land requires the parties to complete Form AG from the LSG. The duplicate certificate of title will need to be produced in order to register the FPA.</p> <p>The registration process for general law land requires the applicant to complete a Schedule 5 – Memorial of instrument not being judgment form under the Registration of Deed Act 1935 (Schedule 5). A copy of the FPA is then attached and lodged for registration in the Register of Deeds.</p> <p>Whether the FPA is to be registered over Torrens, general law or leasehold land, it must be accompanied by any survey, duplicate certificate of title (where relevant) or other document the Registrar General may require.</p>	<p>A plan of an FPA must be registered as a General Registry Office Plan (GP) where the FPVA or FPCA is over part of a lot.</p> <p>A GP is first lodged at the Land Titles Office for approval.</p> <p>The plan must then be lodged for registration at the General Registry Office.</p> <p>Lodgment must occur within one month of the Land Titles Office approving the GP.</p>	<p>The stamp duty is charged using the <i>ad valorem</i> conveyance rate of stamp duty on either the consideration or market value of the interest transferred, whichever is the greater.</p>

## Tasmania

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
Forestry Rights Registration Act 1990 (Tas).	Forestry Right.	Yes	Yes	Yes	No	Recorder of Titles Land Titles Office  Level 1, 134 Macquarie Street Hobart TAS 7000. Ph: (03) 6233 3659 Fax:(03) 6223 8089 Email: <a href="mailto:Titles.Enquiries@dpiw.tas.gov.au">Titles.Enquiries@dpiw.tas.gov.au</a> Website: <a href="http://www.dpiw.tas.gov.au/inter.nsf/ThemeNodes/JGAY-53CUVH?open">http://www.dpiw.tas.gov.au/inter.nsf/ThemeNodes/JGAY-53CUVH?open</a>	A Forestry Right is registered as a profit a prendre on Torrens land in accordance with section 107 of the <i>Land Titles Act 1980</i> (Tas). The appropriate form for lodging a Forestry Right at the Tasmanian Titles Office is the "PP: Instrument Creating a Profit a Prendre".  A Forestry Right over general law land can be registered under section 9 of the <i>Registration of Deeds Act 1935</i> (Tas). The document must be registered in the Register of Deeds.	Boundaries of a forestry right are to be specified by a diagram when the forestry right is over part of a lot. A diagram may be replaced with a new plan.  An unsealed plan of survey may be lodged with the Recorder of Titles to specify the boundaries in a part of land forestry right.	Duty is payable in Tasmania for the agreement for sale or transfer of a profit a prendre in accordance with the <i>Duties Act 2001</i> (Tas) and the <i>Taxation Administration Act 1997</i> (Tas).  The rate of duty payable will vary depending on the dutiable value of the dutiable property.

## Victoria

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
Climate Change Act 2010 (Vic)	Three types of Forest Carbon Right (FCR):  - carbon sequestration right  - forestry right  - soil carbon right	Yes	Yes	No	Yes – subject to the consent of the lessee	The Registrar of Titles  Land Registry business unit of Land Victoria, a division of the Department of Sustainability and Environment.  570 Bourke Street, Melbourne 3000 Ph: (03) 8636 2010 Fax:(03) 8626 2005 Email: <a href="mailto:trs.enquiries@dse.vic.gov.au">trs.enquiries@dse.vic.gov.au</a>	A FCR can be registered on title to the land. The owner of the FCR must submit a creation of Forest Carbon Right Form FCR-C to the Registrar of Titles.		Stamp duty may be payable in Victoria on FCRs at ad valorem rates.

## Western Australia

Act	Interest Granted	Interest in Land?	Freehold Torrens title	General Law Land	Leasehold Land	Administering Agency	Registration Process	Survey Requirements	Stamping Costs
Carbon Rights Act 2003 (WA) (Act).	Carbon Right and Carbon Covenant	Yes	Yes	Yes	Yes	<p>Landgate: Western Australian Land Information Authority</p> <p>P.O. Box 2222, Midland 6936, WA Ph: (08) 9273 7373 Fax:(08) 9250 3187</p> <p>Email: <a href="mailto:customerservice@landgate.wa.gov.au">customerservice@landgate.wa.gov.au</a> Website: <a href="http://www.landgate.wa.gov.au/corporate.nsf">http://www.landgate.wa.gov.au/corporate.nsf</a></p>	<p>In order to register a <u>Carbon Right</u> at the Land Titles office the approved form entitled "<i>Carbon Right</i>" must be used for both freehold and Crown land.</p> <p>A duplicate certificate of title for the property must be produced at Landgate in order for the Carbon Right to be registered.</p> <p>In order to register a <u>Carbon Covenant</u> at the Land Titles office the approved form must be used entitled "<i>Carbon Covenant</i>" for both freehold and Crown Land.</p> <p>The prescribed fee must be paid to register the Carbon Covenant over the Carbon Right.</p> <p>The duplicate certificate of title for the land must be produced in order for the Carbon Covenant to be registered.</p>	<p>A Carbon Right must be surveyed by a surveyor then lodged as an "Interest Only" Plan. The cost of registering the plan is \$213 (plus \$58 for each lot).</p> <p>The survey plan must contain the land description in respect of which the proposed Carbon Right is to be created.</p>	<p>Stamp duty is not levied on initial registration of the Carbon Right or the Carbon Covenant.</p> <p>Subsequent transfers attract stamp duty approximately \$20. This amount is subject to variation depending on the interest involved.</p>

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