



# Carbon rights in WA

*— a new interest in the land*



## Carbon rights in WA — a new interest in the land

Carbon rights are a potential new source of income for owners of land on which vegetation or soils accumulate carbon from the atmosphere. A *carbon right* is the right to the benefits and risks arising from *carbon sequestration* and release on a specified parcel of land. Carbon rights may have a financial value where a market exists for greenhouse gas emission offsets.

Carbon sequestration in this instance means the absorption from the atmosphere of carbon dioxide by vegetation and soils; and the storage of carbon in vegetation and soils. Carbon release can occur where vegetation is cleared or soil is cultivated.

### Carbon Rights Act

The *Carbon Rights Act 2003* establishes a statutory basis for the ownership and protection of *carbon rights*, in order to facilitate trading. It enables a *carbon right* to be registered on the land title as a separate interest in that land. The Act provides that a *carbon right* may be registered with the consent of all parties having an interest in the relevant land.

Registration of a *carbon right* relates only to ownership of the benefits and liabilities of carbon sequestration from the land and gives no guarantee as to the quantity of carbon stored in the carbon sinks on the land, whether the carbon will remain on the land, or what value the carbon may have.

Put simply, the registration of a *carbon right* over a block of land will clarify the ownership of the right to the benefits and liabilities that arise from changes to the atmosphere that are caused by carbon sequestration and carbon release on that block of land.

Owning a *carbon right* is like owning land. The title guarantees who owns the land (or *carbon right*). The market will determine what the land (or *carbon right*) is worth, based on a wide range of factors including how the land is used.

### Carbon covenants

The owner of the *carbon right* may wish to protect their interest in the land by entering into an agreement with the land owner and anyone else whose co-operation is required (for example a lessee) to protect the carbon in the land over which the *carbon right* is registered.



If such an agreement is entered into, the *Carbon Rights Act 2003* provides that the agreement can be registered on the title of the land as a *carbon covenant*. Upon registration, the *carbon covenant* becomes a separate interest in the land.

The *carbon covenant* may deal with how the land is to be used or managed over a period of time. It is the mechanism by which the owner of the *carbon right* can ensure, as far as legally possible, how much carbon is sequestered into the land or released from it.

A *carbon covenant* is intended to ensure preservation of the trees or other land-based resources or continuation of land management practices that sequester the carbon in the land, in the manner agreed by the parties. A *carbon covenant* will affect the land owner and others who have an interest in the land (for example holders of a lease, mortgage, *profit à prendre* etc.) who agree to provide a covenant in favour of the owner of the *carbon right*. It can also describe how costs and revenues from the *carbon right* and *carbon covenant* will be shared.

Income from the sale of *carbon rights* might improve the economics of revegetation and so help reduce the spread of salinity and erosion or help protect biodiversity.

Investment from parties anticipating emissions trading has already helped to fund Western Australia's oil mallee and pine plantings. WA's resources- and energy-based industries could require emission offsets if Australia limits emissions or if international customers require low-emission products.

A *carbon right* also has the attached risk of carbon release. Carbon release is the opposite of carbon sequestration and is where carbon dioxide is released into the atmosphere from land or anything on land. This means the amount of the carbon in the land has decreased, and therefore the amount of carbon represented by the *carbon right* is less.

Carbon release could be caused by force of nature such as bushfire; or intentionally, for example when trees are harvested.

## Benefits and risks from carbon sequestration and release

Direct benefits from carbon sequestration will include income from the sale of *carbon rights* to parties who need to reduce their net emissions of greenhouse gases. This income could supplement returns from commercial plantations and might provide a direct financial return from other types of revegetation or from increases in soil carbon.



The land owner or other person who has entered into a *carbon covenant* will have obligations to the owner of the *carbon right*. For example, there might be limits on the use of the land concerned, or obligations to maintain fences or undertake fire protection.

Land owners should carefully consider their capacity to carry out any obligations or land use limitations to which they agree, as obligations and limitations will generally run with the land.

## The Kyoto Protocol

The *Kyoto Protocol* is an international agreement under which developed industrial nations agree to limit or reduce their emissions of greenhouse gases between 2008 and 2012. Under the Kyoto Protocol, developed nations are required to account for net changes in carbon sinks due to afforestation, reforestation and deforestation since 1990 (Article 3.3) and may elect to account for net changes in carbon sinks due to changes in agricultural practices, rangeland management, forest management and revegetation (Article 3.4) that have occurred since 1990.

Increases in a nation's carbon sinks can be used to offset increases in other greenhouse gas emissions. For reporting purposes, all emissions are converted to CO<sub>2</sub> equivalents (CO<sub>2</sub>-e).

The Kyoto Protocol includes mechanisms for greenhouse gas emission trading between nations.

The commercial benefits of *carbon rights* only arise because of legal agreements that place restrictions or caps on greenhouse gas emissions from industries and make storage of carbon a legitimate way of offsetting those emissions. The Kyoto Protocol does that at international level.



So, for Australian farmers to be able to sell *carbon rights* through this trading scheme, Australia must ratify the Kyoto Protocol. The Commonwealth Government has indicated that it will not ratify the Protocol.

Although Australia has not ratified the Kyoto Protocol, large scale emitters of CO<sub>2</sub> such as energy companies do invest in carbon sinks through unofficial channels.

## Access to the market by farmers

For any form of carbon trading, effective accounting for carbon sinks will be critical. Carbon accounting that complies with Kyoto rules can be costly. Carbon pooling is an option for small-scale projects where a

balance is sought between accounting accuracy and cost, and project life-span. Natural resource management groups, grower groups or primary production companies could provide a pooling mechanism. A guide to carbon pooling and investment structures in planning forest sink projects is available at <http://greenhouse.gov.au/nrm/publications/carbonpooling.html>.

Risks such as drought, fire or pests can be reduced by rigorous site and species selection, and sink management. The market may compensate for risk by reducing the price paid for carbon credits. The level of certainty in carbon accounting may be traded off against the price, which is known as risk discounting.

## How to create a carbon right

The land owner, or someone else, can register a *carbon right* in respect of the land. However, it can only be registered if all of the persons who already have an interest in the land have consented to the *carbon right* being registered. This would include the land owners (if they are not taking the *carbon right*) and any mortgagee of the land.

To create a *carbon right*, the carbon right form must be lodged at the Department of Land Information (DLI). It is possible to lodge a caveat prior to registration of a *carbon right*, so that the person lodging the caveat can be made aware of any dealings in the specified land.

If a *carbon right* is to cover only part of the land in the title, a plan will generally need to be prepared.

For information on plan requirements go to the DLI website at <http://www.dli.wa.gov.au>.

As a *carbon right* is an interest in land, it can be dealt with in ways similar to other interests in land. It can be transferred, surrendered, extended or mortgaged. It can also be given away by will. However it cannot be varied once registered. If it is surrendered (extinguished) totally, it will be removed from the title.

No stamp duty is payable on the *creation* of a *carbon right*, but any subsequent *transfers* or other dealing will be subject to stamp duty in the normal way.

## How to create a carbon covenant

A *carbon covenant* is a legal agreement that has long-term consequences for all parties. A *carbon covenant* will set out each party's rights and obligations. It will bind future owners of those interests in the land that are the subject of the



covenant, including a new owner of the *carbon right*. Any payments to be received under it (for example by the land owner) will probably have tax consequences.

For these reasons, the parties should seek independent legal and tax advice before entering into a *carbon covenant*.

It is possible to have a *carbon right* without a *carbon covenant*, but it is not possible to have a *carbon covenant* without a *carbon right*.

A *carbon right* and a *carbon covenant* must have the same owner at all times.

The *carbon covenant* must be in a particular format, so that it can be registered on the certificate of title. If the *carbon covenant* is to cover only part of the land in the title, a plan will generally need to be prepared. For information on plan requirements go to the DLI website at <http://www.dli.wa.gov.au>.

A *carbon covenant* can only be registered if all of the persons who already have an interest in the *carbon right*, and in the other interests of the parties to the covenant, have consented to the *carbon covenant* being registered. This would include a mortgagee.

To create a *carbon covenant*, the *carbon covenant* form must be registered at the Department of Land Information. It is possible to lodge a caveat prior to registration of a *carbon covenant*, so that the person lodging the caveat can be made aware of any dealings in the specified land.

As a *carbon covenant* is an interest in land, it can be dealt with in similar ways to other interests in land. It can be transferred, surrendered, extended or mortgaged, and the terms of the agreement can be changed. It can also be given away by will. If it is surrendered (extinguished) totally, it will be removed from the title.

There can be multiple covenants. For example, the land owner might enter into one covenant with the *carbon right* holder (perhaps a tree plantation company) and then later a mortgagee of the land might also enter into a second covenant in favour of the *carbon right* holder.

No stamp duty is payable on the *creation* of a *carbon covenant*, but any subsequent *dealings* on a *carbon covenant* will be subject to stamp duty in the normal way.



## Relationship between Carbon Rights Act and Tree Plantation Agreements Act

The *Carbon Rights Act* and *Tree Plantation Agreements Act* are not related, although each may relate to the same area of land (and therefore any trees on that land). They are separate interests in land. One interest can be held without the other. Plantation interests and tree plantation agreements are the subject of a separate brochure *Tree plantations – securing your rights* available at <http://www.agric.wa.gov.au>.

## Further information

### Organisations

Department of Land Information (DLI), PO Box 2222, Midland WA 6936, telephone: (08) 9273 7044, facsimile (08) 9273 7651, e-mail: [lrc@dl WA.gov.au](mailto:lrc@dl WA.gov.au), website: <http://www.dli.wa.gov.au>.

Registration forms to register, mortgage, extend, transfer or surrender a *carbon right* or *carbon covenant*, or to vary a *carbon covenant*, may be downloaded at <http://www.dli.wa.gov.au/corporate.nsf/web/Registration+Forms>.

DLI can only provide advice on the requirements to complete and register the form. It does not provide legal advice on carbon rights, carbon covenants or tree plantation agreements.

The emerging range of carbon credit providers, brokers and certification groups can be traced through industry networks or web search.

### Publications

*Opportunities for the Western Australian land management sector arising from greenhouse gas abatement*, prepared for the Western Australian Greenhouse Taskforce contains some case studies on the profitability of carbon farming in WA. It is available as hard copy or CD, and can be downloaded from the Department of Agriculture website at <http://www.agric.wa.gov.au/>.

*Carbon Rights Act 2003* – freely downloadable from State Law Publisher website at <http://www.slp.wa.gov.au/statutes/swans.nsf> or printed copy from State Law Publisher, Ground Floor, 10 William Street, Perth WA 6000, telephone 9321 7688.

*Planning forest sink projects* – a guide to legal, taxation and contractual issues can be found at <http://greenhouse.gov.au/nrm/publications/forestsinks.html>.

*Tree plantations – securing your rights* is a companion brochure available from the Department of Agriculture website at <http://www.agric.wa.gov.au>.



## Websites

The WA Government Greenhouse website provides links to a range of other sites having information about carbon sequestration, carbon rights and climate change at

<http://www.greenhouse.wa.gov.au/>.

## Tools

The Carbon Farmer Model report, spreadsheet and user manual can be accessed from

<http://www.rirdc.gov.au/fullreports/aft.html>.

TimberCAM is a carbon accounting model that tracks the fate of carbon stored in wood products through their life cycle from harvest through to manufacture, service and disposal. Access it at

<http://www.greenhouse.crc.org.au/>.

National Carbon Accounting Toolbox is available from the Australian Greenhouse Office at:

<http://www.greenhouse.gov.au/ncas/index.html>.

Field measurement procedures for carbon accounting from

[http://www.greenhouse.gov.au/land/bush\\_workbook\\_a3/index.html](http://www.greenhouse.gov.au/land/bush_workbook_a3/index.html).

**Disclaimer:** This brochure was based on the best available information at the time of publication but is provided as a general guide only. Conditions may change over time and before making any decisions readers are advised to seek further advice.

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