CAR-01 Carbon Rights and Carbon Covenants

Version 1 – 11/10/2017

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1 Overview

The establishment of Greenhouse gas targets (as contemplated under the Kyoto Protocol) are complemented by the establishment of, and trade in, carbon credits.

A carbon right is the right to the benefits and risks arising from carbon sequestration and release on a specified parcel of land.

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

2 Carbon Rights Act 2003

The Carbon Rights Act 2003 establishes a statutory basis for the ownership and protection of carbon rights. It enables a carbon right to be registered on the certificate of title to land. A carbon right can apply to either freehold or Crown land and will remain on the title until such time as it is surrendered.

Once a carbon right has been registered on title, those rights exist at law and have the benefit of priority and indefeasibility under the TLA.

Note: Even though the existence of these rights is guaranteed, their value is not and the State has no involvement in determining their value. Their value will be determined by the market, in the same way that the values of other interests in land are determined under the TLA.

The creation of carbon rights will provide:
- legal certainty as to the nature of the right, which will value add to carbon rights and increase use of the proposed international carbon accounting system

and

- a reporting mechanism to Government for the amount of carbon sequestration on affected land, for the purposes of national accounting by Australia in respect if its obligations under the Kyoto Protocol.

3 Creation of a Carbon Right

A carbon right interest in land is created when a carbon right, in a form approved by the Registrar of Titles, is registered under the TLA in favour of a legal entity. A Form CR1 Carbon Right has been created for this purpose.

A carbon right interest in land may be created by the registered proprietor of:

- land
- a lessee’s interest in freehold or Crown land
- a grantee’s interest in a Profit à Prendre under the LAA
- a grantee’s interest in a Timber Share-farming Agreement under the CALM Act

or

- Crown land.

It is not essential that a carbon right interest in land relates to a plantation of trees, it may relate to grazing or agricultural land etc.

Note: The proprietor of a carbon right does not have ownership of the carbon in or on the land.

4 Registration of a Carbon Right

4.1 Lodging the CR1

To create a carbon right, a Carbon Right form must be lodged for registration at Landgate upon payment of the prescribed registration fee.

No stamp duty is payable on the creation of a carbon right, transfer, variation, extension or surrender of the interest created under the Carbon Rights Act 2003.

A carbon right must specify a term, which may be in perpetuity.

The duplicate title (if any) must be produced with the document.

Note: It is possible for the holder of a carbon right to lodge a caveat prior to its registration.

4.2 Creating a Deposited Plan – if required
If the land the subject of the carbon right is only part of the land contained in the certificate of title, a Deposited Plan having as the purpose Interest Only may need to be prepared and lodged by a licensed surveyor. There is a need to accurately define the area of land affected as only one carbon right can be registered over any particular piece of land. Carbon rights cannot overlap each other.

4.3 Consents

A carbon right will not be registered unless it has the written consent of all persons who have a registered interest in the land in respect of which the carbon right is created.

Note: If a carbon right is in respect of Crown land, it shall not be registered unless there is compliance with s.18 of the LAA.

4.4 Additional Comments

A Carbon right will be endorsed in the second schedule of the title as a SMR Primary Interest in the land.

A carbon right is a registered interest in land. It can be dealt with in ways similar to other interests in land. It can be extended (see CAR-02 Section 1), transferred (see CAR-02 Section 2), mortgaged (see CAR-02 Section 3) or surrendered (see CAR-02 Section 4). It can also be devised under a Will and be the subject of a Property (Seizure and Sale) Order. However, it cannot be varied once registered.

5 Carbon Covenants

A carbon covenant sets out the covenants (positive and negative) on which:

- other interests in land can be exercised

or

- land can be used.

Carbon covenants are the terms by which the carbon in the land is effectively protected for the benefit of the proprietor (holder) of the carbon right.

They are used as a control mechanism to ensure the continuation of the trees or other land-based resources underlying or providing the carbon sequestration (i.e. to maintain and protect trees, not to diminish water supply, not to cut timber etc.).

The burden of the carbon covenants may affect adjoining landowners and/or proprietors of other interests in land affected by a carbon right e.g. the registered proprietor of the land itself, a lessee, mortgagees, grantee of a profit à prendre etc. who agree to give a carbon covenant in favour of the holder of the carbon right.

Note: It is possible to have a carbon right without a carbon covenant, but it is not possible to have a carbon covenant without the creation of a carbon right.
6 Carbon Rights Act 2003

The Carbon Rights Act 2003 establishes a statutory basis for the creation of carbon covenants. It enables a carbon covenant to be registered on the certificate of title to land. A carbon covenant can apply to either freehold or Crown land and will remain on the title until such time as it is surrendered.

7 Creation of a Carbon Covenant

A carbon covenant interest in land is created when a carbon covenant, in a form approved by the Registrar of Titles, is registered under the TLA in favour of a legal entity. A Carbon Covenant form has been created for this purpose and can be downloaded from the Landgate website under https://www0.landgate.wa.gov.au/for-individuals/Land-Transactions-toolkit/forms-and-fees.

The proprietor of the carbon rights must at all times be the proprietor of the relevant carbon covenant.

The proprietor of a carbon covenant may also be the person burdened by the covenants.

A carbon covenant need not be given over the same land as the carbon right.

There can be multiple carbon covenants created with regard to a carbon right. For example, the land owner might enter into one covenant with the holder of the carbon right and then later a mortgagee of the land might also enter into a second covenant in favour of the holder of the carbon right.

8 Registration of a Carbon Covenant

8.1 Lodging the CC1

To create a carbon covenant, a Carbon Covenant form must be lodged for registration at Landgate upon payment of the prescribed registration fee.

No stamp duty is payable on the creation of a carbon covenant, transfer, variation, extension or surrender of the interest created under the Carbon Rights Act 2003.

The Carbon Covenant form must specify the day on which the carbon covenant is to commence. This cannot be before the relevant carbon right is created and it cannot be longer than the term of the relevant carbon right.

The duplicate title (if any) must be produced with the document.

Note: It is possible for the holder of a carbon covenant to lodge a caveat prior to its registration.

8.2 Creating a Deposited Plan – if required

If the land the subject of the carbon covenant (the burdened land) is only part of the land contained in the certificate of title, a Deposited Plan having as the purpose Interest Only may need to be
prepared and lodged by a licensed surveyor.

8.3 Consents

A carbon covenant will not be registered unless it has the written consent of each person who has a registered interest in:

- the land to be burdened by the proposed carbon covenant

and

- the relevant carbon right.

Note: If a carbon covenant is in respect of Crown land, it shall not be registered unless there is compliance with s.18 of the LAA.

8.4 Additional comments

A Carbon Covenant will be endorsed in the second schedule of the title as a SMR Subsidiary Interest to the relevant carbon right.

A carbon covenant is a registered interest in land. It can be dealt with in ways similar to other interests in land. It can be extended (see CAR-02 Section 5), varied (see CAR-02 Section 6) transferred (see CAR-02 Section 1 7), mortgaged (see CAR-02 Section 8) or surrendered (see CAR-02 Section 9). It can also be devised under a Will and be the subject of a Property (Seizure and Sale) Order.

9 Also see

- CAR-02 Carbon Rights - amendments to