Issues in negotiating a carbon sequestration agreement for a biosequestration offsets project

Issues in Negotiating a Carbon Sequestration Agreement for a Biosequestration Offsets Project

Sharon Christensen, W D Duncan, Angela Phillips and Pamela O'Connor*

Biosequestration of carbon in trees, forests and vegetation is a key method for offsetting greenhouse gas emissions. To facilitate it, the Commonwealth has introduced the Carbon Farming Initiative, a scheme whereby carbon credits can be earned for biosequestration offsets projects. The project proponent must acquire under state law a 'carbon sequestration right' which confers the benefit of the sequestered carbon on the land. Each State provides for an agreement associated with the carbon sequestration right between the landowner and the holder of the right ('carbon sequestration agreement'). This article identifies some key risks and issues that must be considered in the drafting of a carbon sequestration agreement to support the successful operation of a biosequestration offsets project.

Biosequestration of carbon dioxide in trees, forest and vegetation is increasingly recognised as an important measure to reduce greenhouse gas emissions in the atmosphere and consequently, mitigate the effects of climate change.[1] Australia has recently introduced the federal Carbon Farming Initiative, an incentive-based scheme which allows a proponent to claim tradeable carbon credits for carbon sequestered by a biosequestration offsets project.[2] A project proponent must hold the 'applicable carbon sequestration right' over the project area in order to conduct a biosequestration offsets project. These rights are obtained under state laws. All Australian states have legislated to create property rights over carbon sequestered in

* Sharon Christensen, Gadens Professor of Property Law, Faculty of Law, Queensland University of Technology, Consultant Gadens Lawyers. W D Duncan, Professor of Law, Faculty of Law, Queensland University of Technology, Consultant Allens Linklaters. Angela Phillips, Senior Research Associate, Queensland University of Technology. Pamela O'Connor, Associate Professor of Law, Faculty of Law, Monash University. The authors acknowledge receipt of funding from the Australian Research Council, Discovery Project 1094061 'An Integrated Legal Regime for a Sustainable Carbon Cycle', although the views herein are those of the authors and are not necessarily those of the Council.

[1] Australian Government, *Securing a Clean Energy Future: The Australian Government's Climate Change Plan* (10 July 2011) 30 <http://www.cleanenergyfuture.gov.au/clean-energy-future/securing-a-clean-energy-future/>. The Kyoto Protocol enumerates particular obligations relating to emissions trading, and biosequestration specifically: *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 37 ILM 22 (entered into force on 16 February 2005) arts 2, 3, 17. The United Nations Framework Convention on Climate Change places obligations on Australia in relation to mitigating climate change generally and more specific obligations relating to the protection of sinks and reservoirs, which include biological sequestration: *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 31 ILM 849 (entered into force on 21 March 1994) ('*United Nations Framework Convention on Climate Change*') art 4. For definitions of 'sinks' and 'reservoirs' see *United Nations Framework Convention on Climate Change*, art 1.

[2] A 'sequestration offsets project' is a project that sequesters carbon from the atmosphere and stores it in living biomass, dead organic matter or soil: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 54 (referred to in this article as a 'biosequestration offsets project'). The Carbon Farming Initiative also allows for establishment of an 'emissions avoidance offsets project', which is a project that reduces emissions at source in relation to agriculture and other specified activities: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 53.

trees or vegetation on land ('carbon sequestration rights').[3] Invariably there will be an agreement underpinning the sale of carbon sequestration rights to a project proponent ('carbon sequestration agreement').

A carbon sequestration right is an interest in land,[4] but unlike traditional categories of interest in land such as mortgages, leases and easements, the incidents of a carbon sequestration right are not established through legislation or common law. It is left to the associated carbon sequestration agreement to establish the parameters and incidents of the right, hence elevating the importance of these agreements. Contents of a carbon sequestration agreement will also be influenced by the regulatory regime under which the biosequestration offsets project is conducted. The federal Carbon Farming Initiative regime is comprised of the *Carbon Credits (Carbon Farming Initiative) Act 2011*, associated *Carbon Farming Regulations*, and any relevant methodology determination. The Act and Regulations have been in existence since mid 2011, but methodology determinations for three different types of biosequestration offsets projects have been declared more recently.[5] The first of these, the *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* ('*Permanent Environmental Plantings Methodology Determination*'), was declared in mid 2012.[6] The requirements of one of these methodology determinations, if applicable to the project, may influence the contents of a carbon sequestration agreement. An agreement must also be drafted in accordance with the state carbon sequestration legislation, which can vary significantly between jurisdictions. Integration of both federal and state legislative requirements into a carbon sequestration agreement will prove a challenging exercise.

This article aims to outline a number of issues that will need to be considered in the preparation and drafting of a carbon sequestration agreement. We do not aim to provide specific guidance on the framing of clauses for inclusion in such an agreement, but rather to

[3] *Conveyancing Act 1919* (NSW) ss 87A, 88AB; *Forestry Act 1959* (Qld) pt 6 and *Land Title Act 1994* (Qld) pt 6, div 4C; *Forest Property Act 2000* (SA) s 5; *Forestry Rights Registration Act 1990* (Tas) ss 3, 5; *Climate Change Act 2010* (Vic) ss 20-25; *Carbon Rights Act 2003* (WA) ss 3, 5, 6.

[4] *Land Title Act 1994* (Qld) s 97N; *Climate Change Act 2010* (Vic) s 25(1); *Carbon Rights Act 2003* (WA) s 6; *Forestry Rights (Registration) Act 1990* (Tas) s 3. In New South Wales, a carbon sequestration right is deemed to be a profit à prendre which is an interest in land: *Conveyancing Act 1919* (NSW) s 88AB. In South Australia, a carbon sequestration right is deemed to be a profit à prendre for the purposes of transactions conducted under the relevant land titles legislation: *Forest Property Act 2000* (SA) s 12.

[5] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) (declared as a methodology determination on 8 June 2012); *Carbon Credits (Carbon Farming Initiative) (Reforestation and Afforestation) Methodology Determination 2013* (Cth) (declared as a methodology determination on 29 January 2013); *Carbon Credits (Carbon Farming Initiative) (Human Induced Regeneration of a Permanent Even-Aged Native Forest) Methodology Determination 2013* (Cth) (declared as a methodology determination on 31 January 2013). These are the only three methodology determinations for sequestration offsets projects at the time of writing (11 February 2013).

[6] However the methodology determination states that it commenced on 1 July 2010: *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 1.2.

highlight issues integral to the transaction and possible approaches for managing the issues Parties will need to consider their individual circumstances when negotiating a carbon sequestration agreement,[7] bearing in mind the long-term nature of the transaction. This article takes the respective interests of the landowner and the project proponent into account, and the scope of the article is restricted to an agreement entered into between a project proponent and a private landowner. We also assume that the carbon sequestration agreement underpins a biosequestration offsets project conducted on private land pursuant to the *Carbon Farming Act* and the *Permanent Environmental Plantings Methodology Determination*.[8]

1. Context

It is necessary to discuss the context in which carbon sequestration agreements are drafted. First, a carbon sequestration right must be obtained by the project proponent in order to conduct a biosequestration offsets project under the *Carbon Farming Act*.[9] Carbon sequestration rights are obtained and registered under state laws. Each State has taken an individual approach to the creation of carbon sequestration rights and uses varying terminology. Rights are labeled variously by the statutes as a 'carbon abatement interest',[10] a 'carbon sequestration right',[11] a 'carbon right'[12] or a 'forest property (carbon rights) agreement'.[13] The term 'carbon sequestration right' is used in this article to refer to any or all of these rights, which are treated alike for purposes of the *Carbon Farming Act*.

A transaction for the sale of carbon sequestration rights must be based in an agreement between the vendor of the carbon sequestration right (generally the landowner) and the purchaser of the carbon sequestration right (the project proponent). Similarly to a carbon sequestration right, an agreement is labeled differently between states as a 'forestry and carbon management agreement',[14] a 'forestry covenant',[15] a 'carbon covenant'[16] or a 'forest property (carbon rights) agreement'.[17] Despite the varied nomenclature, we call these agreements 'carbon sequestration agreements'.

---

[7] Australian Greenhouse Office, *Planning Forest Sink Projects: A Guide to Legal, Taxation and Contractual Issues* (Commonwealth of Australia, 2005) 6.
[8] Biosequestration offsets projects can also be conducted on Crown and native title land: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 43. The *Permanent Environmental Plantings Methodology Determination* was chosen as the model methodology determination as it was the first one declared for a biosequestration offsets project.
[9] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5 (definition of 'project proponent'), 27(4)(e).
[10] *Land Title Act 1994* (Qld) s 97N.
[11] *Conveyancing Act 1919* (NSW) s 87A; *Forestry Rights (Registration) Act 1990* (Tas) s 3; *Climate Change Act 2010* (Vic) s 22.
[12] *Carbon Rights Act 2003* (WA) s 8(1).
[13] *Forest Property Act 2000* (SA) ss 3A, 5.
[14] *Climate Change Act 2010* (Vic) s 27.
[15] *Conveyancing Act 1919* (NSW) s 87A; *Forestry Rights (Registration) Act 1990* (Tas) s 3.
[16] *Carbon Rights Act 2003* (WA) pt 3.
[17] *Forest Property Act 2000* (SA) s 5.

Not all state legislation provides for a carbon sequestration agreement associated with the carbon sequestration right. In South Australia, the carbon sequestration agreement itself constitutes the carbon sequestration right,[18] while in Victoria, Tasmania, Western Australia and New South Wales, a carbon sequestration agreement is a separate document from the carbon sequestration right which can be registered or recorded on the land title register.[19] Queensland legislation does not require an agreement to accompany a carbon sequestration right, but does allow for an agreement to be attached as a schedule to the land titles form creating the carbon sequestration right.[20] The following table illustrates the State legislative structures in more detail:

[18] *Forest Property Act 2000* (SA) ss 5, 6.
[19] *Conveyancing Act 1919* (NSW) s 87A; *Carbon Rights Act 2003* (WA) ss 10-12; *Climate Change Act 2010* (Vic) ss 27, 32; *Forestry Rights Registration Act 1990* (Tas) s 3.
[20] Queensland Government, Land Registry Forms, *Form 36 Carbon Abatement Interest*, item 6 <http://www.derm.qld.gov.au/property/titles/forms.html>.

State	Carbon Sequestration Right	Carbon Sequestration Agreement	Interest in Land?
Queensland	*Carbon abatement interest*	There is no legislative associated contract or covenant.	A carbon abatement interest is an interest in land.[21]
Victoria	*Carbon sequestration right*	A *forestry and carbon management agreement* can be recorded on the land title register and will run with the land.[22]	A carbon sequestration right is an interest in land.[23] A forestry and carbon management agreement is not.
New South Wales	*Carbon sequestration right*	A *forestry covenant* can be recorded on the land title register and will run with the land.[24]	A carbon sequestration right is deemed to be a profit à prendre[25] and therefore an interest in land. A forestry covenant is an interest in land within the meaning of section 42 of the *Real Property Act 1900*.[26]
Western Australia	*Carbon right*	A *carbon covenant* is an agreement that can be registered on the land title register and will run with the land.[27]	A carbon right and a carbon covenant are both interests in land.[28]
South Australia	*Forest property (carbon rights) agreement*	There is no legislative associated contract or covenant. The agreement itself constitutes the carbon sequestration right.	A forest property (carbon rights) agreement is not expressly classified as an interest in the land.[29]
Tasmania	*Carbon sequestration right*	A *forestry covenant* can be registered on the land title register and will bind future landowners.[30]	A carbon sequestration right is an interest in the land.[31] A forestry covenant is not an interest in the land.

[21] *Land Title Act 1994* (Qld) s 97N.
[22] *Climate Change Act 2010* (Vic) ss 27, 28, 33.
[23] *Climate Change Act 2010* (Vic) s 25(1).
[24] *Conveyancing Act 1919* (NSW) ss 87A, 88EA(5); *Real Property Act 1900* (NSW) s 42.
[25] *Conveyancing Act 1919* (NSW) s 88AB.
[26] Once recorded on the register*: Conveyancing Act 1919* (NSW) s 88EA(5).
[27] *Carbon Rights Act 2003* (WA) s 12.
[28] *Carbon Rights Act 2003* (WA) ss 6, 12.
[29] However a forest property agreement is deemed to be a profit à prendre for the purposes of transactions conducted under the relevant land titles legislation: *Forest Property Act 2000* (SA) s 12.
[30] *Forestry Rights (Registration) Act 1990* (Tas) ss 3, 6.
[31] *Forestry Rights (Registration) Act 1990* (Tas) s 3.

State legislation sets out the basic structure for creation of a carbon sequestration right and associated agreement (if any), but contains minimal detail on the required contents of an agreement. The legislation neither sets out comprehensive guidelines for the contents of a carbon sequestration agreement nor places any restriction upon the contents of an agreement. Parties are granted significant freedom to transact on their own terms.[32] For example, unlike a restrictive covenant, these agreements can be used to impose positive obligations.[33]

A carbon sequestration agreement will be guided to some extent by the relevant State and Commonwealth regulatory regimes. State legislative provisions are mainly concerned with the registration, transfer and removal of a carbon sequestration right and its associated agreement (if any). These provisions will need to be taken into account when drafting a carbon sequestration agreement. The Commonwealth regime is comprised of the *Carbon Farming Act*, *Carbon Farming Regulations,* and any applicable approved methodology for the project. Each project conducted under the *Carbon Farming Act* must be conducted in accordance with an approved methodology.[34] A person[35] may apply to the Domestic Offsets Integrity Committee[36] for the endorsement of a proposed methodology for a carbon farming project.[37] Once endorsed,[38] it may be declared a 'methodology determination', which is a legislative instrument made under the *Carbon Farming Act*.[39] A methodology determination will contain eligibility requirements along with notification, record-keeping and monitoring requirements for a project.[40] Currently, there are three methodology determinations for different types of biosequestration offsets project.[41] For the purposes of this article, we take the *Permanent Environmental Plantings Methodology Determination* as our example. A

[32] For example, a Western Australian agreement may include a positive or negative right, obligation or restriction that relates to any matter affecting carbon sequestration or carbon release on the land. Victorian agreements may include 'any provision the parties consider desirable' and Tasmanian and New South Wales agreements may include any positive or restrictive covenant that is incidental to a carbon sequestration right: *Climate Change Act 2010* (Vic) s 29(2); *Conveyancing Act 1919* (NSW) s 87A; *Carbon Rights Act 2003* (WA) s 10; *Forestry Rights (Registration) Act 1990* (Tas) s 3. See also *Forest Property Act 2000* (SA) s 6.

[33] *Climate Change Act 2010* (Vic) ss 28(2), (3); *Conveyancing Act 1919* (NSW) s 87A; *Forest Property Act 2000* (SA) s 6(2); *Forestry Rights Registration Act 1990* (Tas) s 3; *Carbon Rights Act 2003* (WA) s 10(2). See further P O'Connor, 'Contractual Specification of New Property Rights in Resources: The Problem of Measurement Costs' *Mon LR* (In press, 2013).

[34] All projects must be conducted pursuant to an approved methodology: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 27(4)(b).

[35] 'Person' means any of the following: (a) an individual; (b) a body corporate; (c) a trust; (d) a corporation sole; (e) a body politic; (f) a local governing body: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 5.

[36] An independent expert committee supporting the environmental integrity of carbon offsets generated under the Carbon Farming Initiative: see further *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) pt 26.

[37] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 109.

[38] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 112.

[39] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 106(1).

[40] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 106(1), (3).

[41] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth); *Carbon Credits (Carbon Farming Initiative) (Reforestation and Afforestation) Methodology Determination 2013* (Cth); *Carbon Credits (Carbon Farming Initiative) (Human Induced Regeneration of a Permanent Even-Aged Native Forest) Methodology Determination 2013* (Cth).

carbon sequestration agreement will need to enable compliance with the *Permanent Environmental Plantings Methodology Determination* and the requirements of the *Carbon Farming Act* and *Carbon Farming Regulations*.

The *Carbon Farming Act* sets out a number of requirements a biosequestration offsets project must comply with, most notably for the permanence of sequestered carbon. Carbon credits issued under the *Carbon Farming Act* purport to provide a permanent abatement of emissions. Therefore, each carbon credit unit issued represents one tonne of carbon emissions that must remain sequestered in the project area for a minimum of one hundred years.[42] If there is a significant reversal[43] of carbon sequestration before the minimum of one hundred years has elapsed, consequences arise under the *Carbon Farming Act*. Firstly, a 'relinquishment requirement' may be imposed upon the project proponent in certain circumstances where carbon sequestration is reversed.[44] If this requirement is not complied with, a 'carbon maintenance obligation' may be imposed upon the land,[45] which may adversely affect the landowner.

Relinquishment requirement[46]

A relinquishment requirement is imposed upon a project proponent and requires the relinquishment of a specified number of carbon credits. A relinquishment requirement may be imposed in certain circumstances where there has been a significant reversal of sequestered carbon within a hundred years after the first carbon credits were issued for the project. First, a relinquishment requirement may be imposed if the reversal is not attributable to natural disturbance, reasonable actions taken to reduce the risk of bushfire, or conduct of a third party which the project proponent could not reasonably control.[47] A relinquishment requirement may also be imposed if a significant reversal of sequestered carbon is attributable to natural disturbance or conduct of a third party which the project proponent could not reasonably control and the project proponent has not taken reasonable steps to mitigate the damage.[48] Finally, a relinquishment requirement may be imposed if false or misleading information has been given in connection with the project,[49] or the declaration of an eligible offsets project has been revoked.[50]

---

[42] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 87.
[43] A reversal of the removal of carbon dioxide from the atmosphere is taken to be a significant reversal if the event caused, or is likely to have caused, the reversal on at least: (a) 5% of the project area, or project areas in total; or (b) 50 hectares of the project area or areas; whichever area is the smaller: *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 7.1A.
[44] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 87-91.
[45] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97.
[46] See also P O'Connor et al, 'From Rights to Responsibilities: Reconceptualising Carbon Sequestration Rights in Australia' *EPLJ* (In press, 2013).
[47] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 87, 90.
[48] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 87, 91.
[49] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 88.
[50] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 89.

Carbon maintenance obligation[51]

If a relinquishment requirement is not complied with within 90 days,[52] a carbon maintenance obligation may be imposed over the project area of land.[53] The carbon maintenance obligation prohibits the landowner and any other person from engaging in conduct that results in a reduction below the 'benchmark sequestration level'.[54] The benchmark sequestration level is the number of tonnes of carbon sequestered in the project area at the time when a carbon maintenance obligation is imposed.[55] If this level is reduced after the carbon maintenance obligation is imposed, the owner or occupier of the land must take all reasonable steps to return the level of sequestered carbon to the benchmark sequestration level.[56] Additionally the landowner or any other person cannot engage in conduct that is not a 'permitted carbon activity'.[57] A 'permitted carbon activity' is an activity which may be specified by reference to the area(s) of land on which it can be carried out, the manner in which it can be carried out, the time(s) or period(s) during which it can be carried out, and the person(s) who may carry it out.[58] Failure to comply with these obligations may result in the imposition of pecuniary penalties.[59] The Clean Energy Regulator may also seek performance or restraining injunctions against the landowner in relation to these obligations.[60] The *Carbon Farming Act* provides two options for the removal of a carbon maintenance obligation, both of which require monetary expenditure.[61]

Imposition of regulatory sanctions under the *Carbon Farming Act* for reversal of carbon sequestration could have significant financial consequences for the project proponent, and potentially the landowner and any occupier if a carbon maintenance obligation is imposed on the land. The possibility of these sanctions must be taken into account when drafting a carbon sequestration agreement.

---

[51] See also O'Connor et al, above n 46.
[52] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 90(4), 91(4).
[53] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 90(4), 91(4), 97. The Clean Energy Regulator may also declare this obligation where the Regulator is satisfied that it is likely the person will not comply with the relinquishment requirement within 90 days, or it is likely that a relinquishment requirement will be issued and not complied with.
[54] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97(9).
[55] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97(8).
[56] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97(10).
[57] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97(9).
[58] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 97 (2), (4).
[59] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 97(9)-(12), 221.
[60] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 100.
[61] A carbon maintenance obligation may be removed either: (a) when the non-relinquishment penalty is paid by the project proponent; or (b) when the entire number of carbon credits issued for the project are voluntarily relinquished by the project proponent or another person: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 97(14)(a),(b), 99, 179. For method (a), the Act does not expressly state that the penalty must be paid by the project proponent. However the penalty is payable by a person who, under the Act, is required to relinquish carbon credits (s 179(1)) and generally the person under the Act who is required to relinquish carbon credits is the project proponent: ss 89(2), 90(2), 91(2). The exception to this is that a person who provides false or misleading information may be required to relinquish carbon credits: s 88(2). It appears that the Clean Energy Regulator also has discretion to revoke the carbon maintenance obligation on their own initiative or upon application made to the Regulator by a person: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 98.

It will be a challenging task to draft a carbon sequestration agreement that takes all of the essential components of the state and Commonwealth regulatory regimes into consideration. Drafters must ensure they are aware of all relevant provisions and the variety of circumstances that may arise and lead to imposition of regulatory sanctions. Furthermore, there is a wide variance between states in the structure and substance of carbon sequestration legislation. Despite the differences in state legislative structure, this article is drafted with a view to developing a carbon sequestration agreement of a general nature that could apply across all jurisdictions.

2. Pre-transactional Steps

There are a number of processes involved in acquiring a carbon sequestration right, entering into an associated carbon sequestration agreement, and obtaining approval for a biosequestration offsets project under the *Carbon Farming Act*. Obtaining finance is also likely to be a necessary step in establishing a biosequestration offsets project.

The *Carbon Farming Act* contains several requirements that must be met before a declaration of an eligible offsets project will be made. First, the project proponent must obtain the legal right to carry out the project and must be the registered owner of the applicable carbon sequestration right for the project area.[62] Both of these requirements will be fulfilled through the grant of a carbon sequestration right and entry into an associated agreement.[63]

The project proponent must also become a recognised offsets entity under the *Carbon Farming Act*,[64] obtain the written consent of all holders of an eligible interest in the land to the application for project approval,[65] and obtain all necessary regulatory approvals for the project.[66] Holders of an eligible interest in the land will include registered lessees and mortgagees.[67] This is consistent with legislation in several states requiring consent of registered lessees and mortgagees before a carbon sequestration right can be granted or

[62] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5, 27(4)(e). See also definitions of 'project proponent' and 'applicable carbon sequestration right' in s 5.
[63] See Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) 28.
[64] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 27(4)(f), 64.
[65] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 27(4)(k).
[66] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 28: if approvals have not been obtained, the declaration of an eligible offsets project may be made conditional upon all regulatory approvals being obtained before the end of the first reporting period.
[67] Holders of an 'eligible interest' are those who hold an estate in fee simple or any other legal interest or estate in the land, or a mortgagee or chargee of an estate or interest in the land: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 44.

registered over land.[68] For the purposes of efficiency, a project proponent may wish to obtain consent from any registered lessees or mortgagees to the grant of a carbon sequestration right and the application for a biosequestration offsets project simultaneously. Additionally, a project proponent may need to obtain the consent of any holders of a mining or petroleum lease over the project area. Consent from these parties may not be required under Commonwealth or state legislation[69] but could be required pursuant to the carbon sequestration agreement. This would provide additional protection from the risk of project disturbance due to other land uses.

A project proponent must ensure that all State and Commonwealth environmental, water, and land use or development approvals required for the project are in place.[70] Federal approval may be required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) if the project will have, or is likely to have, a significant impact on a matter of national environmental significance.[71] There are also a range of State approvals that may be required. Once all of the abovementioned requirements have been fulfilled, a declaration of an eligible offsets project can be made[72] and the project may commence operation. Drafting of the carbon sequestration agreement will come early in the process and must take all of these steps into consideration.

3. Operational Clauses

Operational clauses of a carbon sequestration agreement will deal with the day-to-day workings of the project and allocate rights and obligations to both the landowner and the project proponent. The project proponent is primarily concerned with maintaining the integrity of the carbon pool[73] over the period of the agreement and the landowner is primarily

[68] *Forest Property Act 2000* (SA) s 6(3)(b); *Land Title Act 1994* (Qld) s 97P(c) (consent is only required where the existing registered interest may be affected by the proposed carbon sequestration right); *Transfer of Land Act 1893* (WA) s 104B; *Climate Change Act 2010* (Vic) s 26(2).

[69] Consent is only required from holders of an eligible interest *in land*: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 44. The holder of a mining or petroleum lease will not necessarily hold an interest in land: see for example *Mineral Resources Act 1989* (Qld) s 10; *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 30; *Petroleum (Onshore) Act 1991* (NSW) s 26. Although Victorian mining legislation does allow for registration of a mining licence which creates an interest in the land, this interest is only created for the purpose of assisting the licensee to exercise their rights under the licence: *Mineral Resources (Sustainable Development) Act 1990* (Vic) ss 70(3),(4).

[70] See *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5, 28.

[71] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15B, 16, 18, 20, 21, 23, 24B, 25, pt 9. 'Matters of national environmental significance' are currently limited to World Heritage properties, National Heritage properties, wetlands of international importance (Ramsar Wetlands), nationally listed threatened species and ecological communities, listed migratory bird species, protection of the environment from nuclear actions, Commonwealth marine areas and the Great Barrier Reef Marine Park.

[72] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 27.

[73] 'Carbon pool' is used in this article to refer to the biomass (including trees and vegetation), dead organic matter and/or soil in the project area, as per the legislative definition: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 5.

concerned with maintaining an income flow from the utilisation of the land although this may be remitted in different ways: in one payment or over the period of the agreement.

In one model, the project proponent may meet the entire cost of establishing and maintaining the carbon pool, re-vegetation or restoration after loss, monitoring and insuring in which case the project proponent would require access for specific reasons to a level which almost requires the exclusivity granted by a lease. In another model, the landowner would be responsible for these activities but would be performing them subject to obligations embodied in the agreement. This would be reflected in the sale price of the sequestered carbon over the life of the agreement. In each case, it is the project proponent that would be entitled to claim carbon credits representing the amount of carbon sequestered by the project.[74]

Some obligations would be placed solely upon the landowner by virtue of their proximity to the site and their capacity as owners to control or limit the effect of activities upon contiguous properties which might impact upon the sequestration process. For instance, a landowner, particularly if they owned or controlled property surrounding the project area would have obligations, for example to exclude livestock from the site, undertake fire prevention measures, control pests, permit access over adjoining property owned by the landowner if required and not to damage nor permit third parties to cause damage to the vegetation on the site. Other obligations are not directly pertinent to the husbandry of the physical land but the protection of the project proponent's interest. Such obligations would be to most commonly ensure that all rates taxes and charges levied by any authority are paid so that the land is not taken in execution.

Operational clauses can be divided into several distinct classes. First, there are clauses setting out rights of access to the project area, including rights to monitor and conduct measurements of the project. A carbon sequestration agreement must also set out clauses for the management and maintenance of the carbon pool.

[74] The Commonwealth legislation effectively provides that carbon credits must be issued to the project proponent: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 11, 15(2)(b)(i).

3.1 Access, Monitoring and Measurement Clauses[75]

Access, monitoring and measurement clauses will be necessary to ensure compliance with the Commonwealth regime. First, a project proponent may need to fulfil monitoring requirements pursuant to the approved methodology for the project.[76] The *Permanent Environmental Plantings Methodology Determination* requires the project proponent to monitor the project area, including disturbance events within the project area.[77] On-ground observation or satellite imagery, or both, may be used to monitor a project.[78] Use of satellite imagery to monitor projects may not always be possible and the project proponent will therefore require rights of access to the project area and rights to monitor a project conducted under this methodology.

A project proponent is also likely to require rights of access and monitoring to gather information that will determine the number of carbon credits issued for the project. Once a project commences operation, a project proponent may apply for a certificate of entitlement for the issue of carbon credits.[79] Upon grant of a certificate of entitlement, the Clean Energy Regulator must issue the number of carbon credits specified in the certificate to the holder of the certificate.[80] The application for a certificate of entitlement must contain information necessary to calculate the total number of tonnes of carbon sequestered by the project.[81] An application may be made for every reporting period of the project. Reporting periods can last between 12 months and 5 years.[82] Project proponents and/or their agents[83] are likely to require rights of access to and from the project area and rights to monitor and conduct measurements in order to calculate the amount of carbon sequestered on a regular basis.

---

[75] See O'Connor et al, above n 46.
[76] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 27(4)(b), 106(3)(d), 194; *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) pt 4. See also *Carbon Credits (Carbon Farming Initiative) (Reforestation and Afforestation) Methodology Determination 2013* (Cth) pt 7; *Carbon Credits (Carbon Farming Initiative) (Human Induced Regeneration of a Permanent Even-Aged Native Forest) Methodology Determination 2013* (Cth) pt 5.
[77] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 4.3.
[78] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 4.3(3).
[79] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 12-15.
[80] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 11.
[81] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 12, 13. Information in the application for a certificate of entitlement must include all of the calculations used to determine the carbon dioxide equivalent net abatement amount for the project: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 13, 76(4); *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 6.2(e). See also Australian Government Clean Energy Regulator, *Carbon Farming Initiative: Certificate of Entitlement Application Including Offsets Report* (7 August 2012) <http://www.cleanenergyregulator.gov.au/Carbon-Farming-Initiative/Forms-and-calculators/Documents/Certificate%20of%20Entitlement%20application%20offsets%20report.pdf>.
[82] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 76.
[83] For example, an application for a certificate of entitlement must be accompanied by a prescribed audit report prepared by a registered greenhouse and energy auditor: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 13(1)(e).

State legislation for carbon sequestration agreements deals minimally with the inclusion of access, monitoring and measurement clauses. Most state legislation contains discretionary guidelines allowing for clauses granting access to land over which a carbon sequestration right is held.[84] No state legislation confers monitoring and measurement rights upon a project proponent. Parties will therefore need to allocate these rights through the terms of the carbon sequestration agreement.

The content of access clauses could fall along a wide spectrum. A landowner may wish to assume the bulk of responsibility for monitoring the project and providing measurements to the proponent. Alternatively, the proponent may be able to conduct the majority of monitoring using satellite imagery.[85] In these cases a project proponent will only require rights of access to the land at occasional intervals, if at all. In another scenario, the project proponent could negotiate for regular rights of access to cultivate, maintain and monitor the carbon pool. A project proponent is also likely to require rights of access to the land to rectify a breach of the landowner which may result in reversal or stagnation of sequestration.[86] The carbon sequestration agreement should set out particulars of access such as frequency, method of access and the purposes for which access is allowed, such as monitoring and taking measurements. The notice period required for access, the type of notice that is required and who it must be provided to should all be set out in the agreement.

3.2 Control, Management and Maintenance Clauses

The *Carbon Farming Act* places responsibility upon a project proponent to ensure the permanence of sequestered carbon. If there is a significant reversal of sequestered carbon in the project area, liability will attach to the project proponent in certain circumstances through the imposition of a relinquishment requirement.[87] A prudent project proponent will therefore negotiate for rights of control and management that will enable them to ensure the permanence of sequestered carbon. The project proponent may also require rights of management and maintenance that allow them to enhance carbon sequestration within the project area to ensure that the maximum possible amount of carbon credits are obtained.

Rights of control, maintenance and management of sequestered carbon are dealt with

[84] *Conveyancing Act 1919* (NSW) s 87A (definition of 'forestry covenant' (a), (d)); *Carbon Rights Act 2003* (WA) s 15(b); *Forestry Rights (Registration) Act 1990* (Tas) s 3 (definition of 'forestry covenant' includes positive or negative covenants that are incidental to a carbon sequestration right (which rights of access arguably are)).
[85] Contemplated in *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 4.3(3).
[86] Western Australian legislation specifically states that a carbon sequestration agreement can grant a licence to enter to inspect or remedy a default: *Carbon Rights Act 2003* (WA) s 15.
[87] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 86-91.

sparingly under state laws. The only State which requires these types of clauses in a carbon sequestration agreement is Victoria. The purpose of a Victorian carbon sequestration agreement is to provide for rights and obligations for the management of carbon sequestration.[88] It must specify who is entitled to control decisions about the timing and extent of vegetation harvesting (or specify the process for how these decisions will be made), and any obligation agreed by the parties in relation to the preservation, enhancement or management of vegetation or soil.[89] Other state legislation is not so prescriptive. In New South Wales and South Australia, a carbon sequestration agreement *may* include clauses regarding maintenance of the carbon pool.[90] Western Australian and Tasmanian legislation does not refer to control, maintenance and management clauses but provides a wide scope for carbon sequestration agreements which could include these clauses.[91] There are no legislative guidelines for carbon sequestration agreements in Queensland.[92]

The *Permanent Environmental Plantings Methodology Determination* may also influence control, management and maintenance clauses in a carbon sequestration agreement.[93] This methodology determination requires that a biosequestration offsets project be comprised of a *permanent* planting.[94] Among other things, the definition of a 'permanent planting' requires that the carbon pool cannot be harvested other than to selectively remove plants to improve the growth rate or health of the remaining vegetation ('thinning'), to remove debris for fire management, and to remove firewood, fruits, nuts, seeds and other miscellaneous material.[95] Once thinned, biomass cannot be removed from the project area unless it is for the purposes of fire management.[96] There are also restrictions on the removal of fallen timber from the

[88] *Climate Change Act 2010* (Vic) s 28; Explanatory Memorandum, Climate Change Bill 2010 (Vic) 6.
[89] *Climate Change Act 2010* (Vic) s 29(1). It may also include prohibitions and restrictions on the use and development of land, and other provisions relating to the management and use of land: s 29(2).
[90] *Conveyancing Act 1919* (NSW) s 87A; *Forest Property Act 2000* (SA) s 6(2)(a).
[91] *Forestry Rights (Registration) Act 1990* (Tas) s 3 (definition of 'forestry covenant' includes positive or negative covenants that are incidental to a carbon sequestration right (which rights of control, maintenance and management arguably are)). Western Australian agreements can contain rights, obligations or restrictions relating to any matter that affects or might affect carbon sequestration or release on the land: *Carbon Rights Act 2003* (WA) s 10 (1).
[92] Although a carbon sequestration right in Queensland confers 'a right to deal with carbon abatement product on the land' which could arguably encompass rights of control, maintenance or management: *Forestry Act 1959* (Qld) s 61M(1).
[93] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) pt 2. See also *Carbon Credits (Carbon Farming Initiative) (Reforestation and Afforestation) Methodology Determination 2013* (Cth) pt 4; *Carbon Credits (Carbon Farming Initiative) (Human Induced Regeneration of a Permanent Even-Aged Native Forest) Methodology Determination 2013* (Cth) pt 3.
[94] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) ss 1.3, 1.4; *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 1.3 ('permanent planting' definition).
[95] Removal of firewood, fruits, nuts, seeds, or material used for fencing or as craft materials is only allowed if those things are not removed for sale. Harvesting can also occur in accordance with traditional indigenous practices or native title rights: *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 1.3 ('permanent planting' definition).
[96] Or in accordance with traditional indigenous practices or native title rights: *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 2.1.

project area.[97] The methodology determination prohibits livestock grazing in the project area for three years following planting and at any time if it would prevent regeneration of trees.[98] These restrictions are quite specific. A carbon sequestration agreement underpinning a project conducted pursuant to this methodology determination would need to contain clauses in accordance with its provisions. Obligations to refrain from harvesting and prevent livestock grazing would necessarily fall upon the landowner.

Rights of control, management and maintenance granted to a project proponent may fall along a wide spectrum. In one instance the proponent may require substantial control over the project including exclusive rights to establish, maintain and restore (if necessary) the carbon pool. Conversely, the landowner may retain these rights subject to restrictions upon matters such as harvesting and livestock grazing. A landowner will need to consider their own position when granting rights of control, maintenance and management over the land. Under the *Carbon Farming Act*, liability for reversal of carbon sequestration in certain circumstances will fall upon the project proponent in the first instance.[99] If the project proponent does not meet that liability through the relinquishment of carbon credits, a carbon maintenance obligation may be imposed on the land.[100]

Consequently, the landowner should retain sufficient control over the land to manage his or her own potential liability under the *Carbon Farming Act* in order to avoid the imposition of a carbon maintenance obligation. This may involve rights to intervene in the project upon proponent default in order to avoid reversal of carbon sequestration. It could also involve concurrent rights of control, management and maintenance for the landowner and the proponent throughout the project. Parties will need to carefully consider their potential liability under the *Carbon Farming Act* and how rights of control, management and maintenance can best be allocated to manage liability. A project proponent will also need to consider how to maximize carbon sequestration through management and maintenance practices, and draft the agreement accordingly.

[97] Only fallen timber can be removed for firewood and not more than 10% of fallen timber may be removed for firewood in a calendar year: *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 2.1(5).
[98] *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) s 2.1(5)(e).
[99] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 90, 91.
[100] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 97.

3.3 Miscellaneous Clauses

There are a number of miscellaneous matters to be addressed in a carbon sequestration agreement. These are set out below.

3.3.1 Information exchange clauses

Methods of communication between the parties should be agreed upon, and obligations must also be placed upon each party to retain records of important information. The *Carbon Farming Act* and regulations place an obligation upon the project proponent to retain records of certain information for seven years after the making of the record.[101] This information includes correspondence between the proponent and the Clean Energy Regulator in relation to an eligible offsets project, information about the carbon sequestration right held by the proponent, information about regulatory approvals obtained for the project, information used to prepare an offsets report,[102] and other matters.[103] These obligations should be duplicated in the carbon sequestration agreement, together with an obligation upon the landowner to retain records of all information and documents relevant to the project.

Notification requirements are also found in the *Carbon Farming Act*. A project proponent must notify the Clean Energy Regulator of natural disturbances or conduct of third parties that causes significant reversal of carbon sequestration.[104] This notification must occur within 60 days.[105] To ensure compliance with these notification requirements, the carbon sequestration agreement should oblige the landowner to notify the proponent of these events in a timely manner. The method of notification should be specified in the agreement.

A carbon sequestration agreement should contain a duty to co-operate with regards to exchange of information. The project proponent and the landowner could agree to freely exchange information which is relevant to the project, and ensure that the other is fully informed of all material events and circumstances pertaining to the project. For example, the landowner could have an obligation to inform the project proponent of a decision to sell,

---

[101] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 191; *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 17.1.
[102] This information must be retained for seven years after the offsets report is lodged: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 192; *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 17.2.
[103] *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 17.1(2). The *Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012* (Cth) requires a project proponent to retain information such as evidence of species or species mix planted or seeded within the project area and carbon estimation data: s 4.4(1). See also *Carbon Credits (Carbon Farming Initiative) (Reforestation and Afforestation) Methodology Determination 2013* (Cth) pt 7; *Carbon Credits (Carbon Farming Initiative) (Human Induced Regeneration of a Permanent Even-Aged Native Forest) Methodology Determination 2013* (Cth) pt 5.
[104] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 81, 82.
[105] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 81, 82.

lease or mortgage the project area.[106]

3.3.2 Variation clauses

The long-term nature of a carbon sequestration agreement may necessitate the inclusion of a mechanism for variation of the agreement. This clause must be drafted in accordance with existing state provisions on variation of such agreements. The usual position is that an agreement can only be varied by consensus between the parties,[107] although South Australian legislation contemplates unilateral variation of a carbon sequestration agreement.[108] Two states prohibit a variation to the land to which the agreement applies, the parties to the agreement, or the term (end date) of the agreement.[109]

A variation clause in a carbon sequestration agreement must provide for registration of the variation in accordance with state legislative requirements. In the majority of states, carbon sequestration agreements are recorded or registered on the land title register and an instrument of variation must be lodged to amend the agreement.[110] Consent to variation is required from all persons who are bound by the agreement in Victoria and New South Wales.[111]

3.3.3 Compliance clauses

Finally, a carbon sequestration agreement should oblige each party to comply with their respective regulatory requirements and duties to other interest holders, to ensure that the performance of the agreement is not disturbed by third party enforcement action. A landowner would be obliged to comply with other agreements affecting the land such as mortgages or leases, to promptly pay all applicable rates and taxes in respect of the property, and to comply with any notices which may be issued in relation to the land.[112] Project proponents would be obliged to comply with all planning, development and environmental approvals issued in respect of the project, and the provisions of the *Carbon Farming Act*,

---

[106] This obligation could be triggered upon listing of the property for sale/lease, or at the point of signing a contract to sell, lease or mortgage the property.
[107] Australian Greenhouse Office, above n 7, 49. See for example, *Climate Change Act 2010* (Vic) s 34(1).
[108] *Forest Property Act 2000* (SA) s 10(1)(b).
[109] *Climate Change Act 2010* (Vic) s 34(2); *Transfer of Land Act 1893* (WA) s 104I(2)(b).
[110] *Land Title Act 1994* (Qld) s 97S(1); *Forest Property Act 2000* (SA) s 10(4); *Climate Change Act 2010* (Vic) s 34(3); *Conveyancing Act 1919* (NSW) s 88EA(6); *Transfer of Land Act 1893* (WA) s 104I; *Forestry Rights Registration Act 1990* (Tas) s 3 defines a carbon sequestration agreement as a positive or restrictive covenant that is incidental to a carbon sequestration right, contained in the instrument by which the right is registered or amended, and registered on the land title register, or a *variation* of any such covenant (impliedly states that a carbon sequestration agreement may be amended through an instrument of variation).
[111] *Climate Change Act 2010* (Vic) s 34(1); *Conveyancing Act 1919* (NSW) s 88EA(6). South Australian legislation requires consent to variation from holders of a mortgage or charge over the carbon sequestration right, although this class of party would be comparatively rare: *Forest Property Act 2000* (SA) s 10(3).
[112] Australian Greenhouse Office, above n 7, 44.

Carbon Farming Regulations and methodology determination.

4. Risk Allocation

Carbon sequestration projects conducted under the *Carbon Farming Act* carry a number of risks. First, there is the risk that natural disturbance or acts of third parties will reverse carbon sequestration.[113] Regulatory liabilities may arise under the *Carbon Farming Act* if carbon sequestration is reversed. If reversal of carbon sequestration occurs in certain circumstances, the Clean Energy Regulator may impose a relinquishment requirement upon the project proponent.[114] Non-compliance with a relinquishment requirement may result in the imposition of a carbon maintenance obligation over the project area of land.[115] Consequently, a project proponent will be interested in ensuring that a relinquishment requirement is not imposed and a landowner will be interested in ensuring that a carbon maintenance obligation is not imposed.

A carbon sequestration agreement should be drafted to minimise the risk of either occurrence. For example, an obligation could be placed upon the landowner not to act in such a way to destroy or damage vegetation and to use their best endeavours to prevent others from doing so. The landowner could also be obliged to engage in appropriate practices for fire prevention and control, and to mitigate the risk of forest fire, insect infestation or plant disease outbreak.[116] These types of clauses would go towards ensuring that reversal of carbon sequestration resulting in the imposition of a relinquishment requirement does not occur. Similarly a landowner may require clauses to ameliorate the effect of a carbon maintenance obligation, if imposed. The project proponent could be obliged to pay the penalty required for removal of the carbon maintenance obligation.[117] An up-front amount of security could also be required from the project proponent to ensure compliance with this obligation.[118]

Another option to deal with risk allocation is a clause requiring the project proponent to take

---

[113] A Mekouar, K Rosenbaum and D Schoene , *Climate Change and the Forest Sector: Possible National and Subnational Legislation* (FAO Forestry Paper 144, Food and Agriculture Organisation of the United Nations, 2004) 41.
[114] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 87, 90, 91.
[115] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 90(4), 91(4), 97. The Regulator may also declare this obligation where the Regulator is satisfied that it is likely the person will not comply with the relinquishment requirement within 90 days, or it is likely that a relinquishment requirement will be issued and not complied with.
[116] S Hawkins et al, *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement* (Duke Law, Forest Trends and Katoomba Group, 2010) 5 <http://www.forest-trends.org/documents/files/doc_2558.pdf>. For example, proponents/landowners can plant mixed tree species, maintain distances between mature trees and clear dead brush, as appropriate to the forest ecosystem in which the project is situated.
[117] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 97(14), 179, 180.
[118] The Victorian legislation contemplates this and provides that a carbon sequestration agreement may include conditions requiring the deposit of security: *Climate Change Act 2010* (Vic) s 30.

out insurance.[119] In this instance, the landowner may wish to be nominated as an interested person under the insurance policy.[120] An insurance clause in a carbon sequestration agreement could be cast in similar terms as a clause in a lease requiring tenants to insure. Such a clause could require the project proponent to effect an insurance policy that covers specific risks, is on terms acceptable to the landowner, and is taken out in the names of the project proponent and the landowner.[121] Alternatively the landowner could take out an insurance policy and require the project proponent to cover the cost of the insurance premiums and any excess payable.[122] Regardless of which party holds the insurance policy, the proceeds of insurance should be used to reinstate the vegetation unless it is uneconomic or impractical to do so.[123]

In addition to the risk of reversal of sequestration, consideration must also be given to the risk of resources or development approvals. Over the term of the agreement it is feasible that a mining lease or petroleum lease may be granted over the project area. This risk may be negligible depending upon the location of the project area but in other cases it may be prudent for the agreement to provide for the consequences of this approval. Finally, for the purposes of clarity, carbon sequestration agreements that underpin a *Carbon Farming Act* project should be drafted in accordance with the legislative definitions of terms such as 'natural disturbance' and 'carbon maintenance obligation'.[124]

5. Dealings

It is likely that the carbon sequestration agreement will last for a number of years, even up to 100 years in certain cases,[125] and during that time there will be changes in ownership of the project land and the carbon sequestration right. These various changes will have to be reflected upon the land title register and the carbon sequestration agreement will have to remain enforceable by and against the successive parties to the agreement. State legislative provisions deal with these issues to some extent and any carbon sequestration agreement must be drafted with these provisions in mind.

---

[119] Australian Greenhouse Office, above n 7, 41. See, for example, Elders Forestry Insurance: <http://www.eldersforestry.com.au/investment/insurance/index.php>; Australian Forest Growers Plantation Insurance Scheme: <http://www.afg.asn.au/services/insurance.html>.
[120] The landowner will then have a right to recover the amount of their loss from the insurer in accordance with the contract: see *Insurance Contracts Act 1984* (Cth) s 48; *Trident General Insurance Co v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
[121] W D Duncan, *Commercial Leases in Australia* (Thomson Reuters Australia, 6th ed, 2011) 303.
[122] This is generally the practice for commercial leases: ibid 303.
[123] Australian Greenhouse Office, above n 7, 42.
[124] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5, 97(2)(a).
[125] The Commonwealth legislative regime contemplates that a biosequestration offsets project will be maintained for a minimum of 100 years: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 87.

5.1 Dealings with the Land

The project land may be transferred, leased or mortgaged over the course of the carbon sequestration agreement. The holder of a carbon sequestration right will want to ensure that the right and any associated agreement will remain enforceable against a subsequent landowner, lessee or mortgagee.

5.1.1 Enforceability of carbon sequestration right

A carbon sequestration right is an interest in land in all states. This is achieved through either express declaration that the right is an interest in land[126] or by deeming the right to be a profit à prendre,[127] which is an interest in land. As a registered interest in land[128] it will bind any subsequent landowners, lessees or mortgagees.[129] It is clear that in all states a registered carbon sequestration right will be enforceable against a subsequent owner, lessee or mortgagee of the land.

5.1.2 Enforceability of carbon sequestration agreement

While the enforceability of a carbon sequestration *right* against the landowner's successors and assigns is provided for, the enforceability of a carbon sequestration *agreement* is not so clear. All states allow a carbon sequestration agreement to be registered or recorded in some manner on the land title register.[130] Before the substance of the state legislation is discussed, it is instructive to distinguish three possible legal consequences of recording or registration upon the land title register:

---

[126] *Land Title Act 1994* (Qld) s 97N; *Climate Change Act 2010* (Vic) s 25(1); *Carbon Rights Act 2003* (WA) s 6; *Forestry Rights (Registration) Act 1990* (Tas) s 3.

[127] In New South Wales, a carbon sequestration right is deemed to be a profit à prendre which is an interest in land: *Conveyancing Act 1919* (NSW) s 88AB. In South Australia, a carbon sequestration right is deemed to be a profit à prendre for the purposes of transactions conducted under the relevant land titles legislation: *Forest Property Act 2000* (SA) s 12.

[128] *Climate Change Act 2010* (Vic) s 26; *Land Title Act 1994* (Qld) s 97O; *Carbon Rights Act 2003* (WA) s 6; *Conveyancing Act 1919* (NSW) s 88AB; *Forestry Rights Registration Act 1990* (Tas) s 5(2); *Forest Property Act 2000* (SA) s 7.

[129] *Land Title Act 1994* (Qld) s 184; *Transfer of Land Act 1958* (Vic) s 42; *Real Property Act 1900* (NSW) s 42; *Real Property Act 1886* (SA) ss 68, 69; *Land Titles Act 1980* (Tas) ss 39, 40; *Transfer of Land Act 1893* (WA) s 68. In South Australia, a carbon sequestration right is deemed to be a profit à prendre for the provisions of the *Real Property Act 1886* in relation to transactions affecting the right or its registration (*Forest Property Act 2000* (SA) ss 3, 12) so it is not entirely clear that a carbon sequestration right is an interest in land that will gain the benefits of indefeasibility. However, this is clarified to some extent by provisions stating that a registered carbon sequestration right is binding on, and enforceable by and against, a registered landowner or lessee from time to time: *Forest Property Act 2000* (SA) s 9(1). The South Australian legislation also states that the holder of a carbon sequestration right has priority over any mortgagee who was registered after the registration of the carbon sequestration right and also any existing registered mortgagee who consented to registration of the carbon sequestration right: *Forest Property Act 2000* (SA) s 7(3).

[130] See table above at 1 for a thorough description of the different legislative structures. In South Australia, the carbon sequestration agreement itself constitutes the carbon sequestration right, while in Queensland the legislation does not provide for a carbon sequestration agreement to accompany a carbon sequestration right, but does allow for an agreement to be attached as a schedule to the land titles form creating the carbon sequestration right.

(a) Registration is constitutive of an interest, and an instrument has no legal effect until recorded or registered on the land title register.
(b) An instrument may bind the parties in contract, but is not enforceable against third parties until recorded or registered on the land title register. Recording or registration is a precondition to enforcement against third parties, but does not validate the instrument or alter its legal effect. In other words, recording affects only the priority of the interest, not its validity.
(c) Registration not only enables enforcement against third parties, but also validates the interest described in the instrument. In other words, the interest is said to be made 'indefeasible' by registration.

Instruments falling within category (a) depend upon recording or registration for their validity. None of the state legislation places carbon sequestration agreements in this category, as all are enforceable in contract between the parties even if unregistered. Instruments falling within category (b) are those that are 'registered' or recorded on the land title register, such as a carbon sequestration agreement in Victoria, New South Wales and Tasmania,[131] and possibly Western Australia.[132] Instruments within category (b) do not gain the benefits of indefeasibility. Rather, the effect of recording or registration of these instruments is that a purchaser of the land is prevented from relying upon the indefeasibility provisions to defeat these instruments that are notified on his or her certificate of title.[133] Instead the registered proprietor will take their interest subject to a recorded or registered instrument 'for what it is worth' under the general law.[134] In the case of restrictive covenants recorded on the land title, this has meant that the covenant will be enforceable to the extent that is complies with the general legal and equitable requirements for covenants running with land.[135] It is unclear whether the rules for covenants running with land will apply to determine the validity of a carbon sequestration agreement, particularly as the agreement is not classified as a restrictive covenant in any state legislation.[136] The application of these rules to statutory agreements has

[131] *Forestry Rights Registration Act 1990* (Tas) s 6; *Climate Change Act 2010* (Vic) s 33; *Conveyancing Act 1919* (NSW) s 88EA; *Carbon Rights Act 2003* (WA) ss 11, 12.
[132] The Western Australian land titles legislation uses the term 'registered' but it has been concluded that this does not necessarily mean that it is registered with indefeasibility: O'Connor, above n 33, 22-23; S Hepburn, 'Carbon Rights as New Property: The Benefits of Statutory Verification' (2009) 39 *Syd L Rev* 239 at 251-2, 264-9.
[133] A Bradbrook et al, *Australian Real Property Law* (Thomson Reuters Australia, 5th ed, 2011) 891.
[134] P O'Connor, 'Covenants as Regulation' (2011) 1 *Property Law Review* 145 at 148; DJ Whalan, *The Torrens System in Australia* (LawBook Co, 1982) 111. Whalan compares the provisions to the deeds registration system, in that recording affects priority but does not make the interest indefeasible.
[135] *Forestview Nominees Pty Ltd & Silkchime Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at [5], [13]; A Bradbrook and S MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 468-9; O'Connor, above n 134, 148.
[136] See, for example, the *Transfer of Land Act 1893* (WA) which has different parts dealing with carbon sequestration agreements and restrictive covenants respectively (pt IV, divs 2A and 3A); a Victorian provision expressly states that an obligation under a carbon sequestration agreement is not a restrictive covenant: *Climate Change Act 2010* (Vic) s 28(2).

been discussed elsewhere and is beyond the scope of this article.[137]

At a minimum, the validity of a recorded or registered carbon sequestration agreement will be determined by the scope and purpose of the statute authorising the agreement, any other statutory restrictions[138] and general contract law.[139] Limitations on the scope of a carbon sequestration agreement may be implied from the scope, subject matter and purpose of the authorising Act. For example, the *Forestry Rights Registration Act 1990* (Tas) defines a carbon sequestration agreement ('forestry covenant') as a covenant that is incidental to a carbon sequestration right,[140] is contained in the same instrument and is registered. To take a straightforward example, an obligation to walk the covenantee's dog is not incidental to a carbon sequestration right, and is therefore not within the statutory scope of a carbon sequestration agreement. Conversely, an obligation to maintain a firebreak may be considered incidental to a carbon sequestration right, since it may protect the vegetation from destruction by fire. It is clear that determining what the implied limitations of a carbon sequestration agreement might be, and whether a particular term of an agreement exceeds them, requires an exercise in statutory interpretation. This is likely to cause uncertainty and add to transaction costs.[141] To complicate matters even further, some state legislation contains specific provisions about the enforceability of a carbon sequestration agreement against third parties.[142] Speaking broadly, these provisions do not add a great deal to the abovementioned principles.

Instruments falling within category (c) gain the benefits of indefeasibility once registered, but the validating effect does not extend indiscriminately to all covenants in a registered instrument.[143] The question is sometimes framed as determining which covenants are within the scope of indefeasibility, or 'indefeasibility for what'?[144]

---

[137] The authors have previously considered this issue in S Christensen et al, 'Regulation of Land Access for Resource Development: A Coal Seam Gas Case Study from Queensland' (2012) 21(2) *APLJ* 110 at 121-130.

[138] The allowable content of covenants may be restricted by other statutes such as provisions which prevent enforcement of covenants that require unlawful discrimination or lessen competition. See for example *Competition and Consumer Act 2010* (Cth) s 45B ('covenants affecting competition'). See also L Willmott et al, *Contract Law* (Oxford University Press, 4th ed, 2013) ch 18.

[139] Validity of a contract may be affected by, *inter alia*, the following factors: misrepresentation, misleading or deceptive conduct, mistake, duress, undue influence and unconscionable conduct. See Willmott et al, above n 138, pt 5.

[140] *Forestry Rights Registration Act 1990* (Tas) s 3. A forestry right is deemed to be a profit à prendre: *Forestry Rights Registration Act 1990* (Tas) s 5. This is an interest in the land of the covenanting landowner: P Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 512; *Webber v Lee* (1882) 9 QBD 315; *Ex parte Henry* [1963] SR (NSW) 298; *R v Toohey* (1983) 158 CLR 327 at 352.

[141] See further O'Connor, above n 33.

[142] See *Carbon Rights Act 2003* (WA) s 12(3) ('a carbon covenant burdens, attaches to, and runs with, the burdened land'); *Climate Change Act 2010* (Vic) s 33 ('the obligations specified in the agreement run with the land and are binding on any person who derives title to an estate or interest in the land from a party to the agreement'); *Conveyancing Act 1919* (NSW) ss 88EA(4),(5).

[143] *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 9 ALR 39 at 49-50 per Gibbs J; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 7 per Barwick CJ.

[144] The question 'indefeasibility for what?' was coined by Campbell J in *Small v Tomassetti* [2001] NSWSC 1112 at [9] and has been often cited in cases discussing registered mortgages.

Scope of Indefeasibility

First, covenants must fall within the scope of indefeasibility to gain the protection of indefeasibility. There are several elements to this. The general common law rule is that covenants that are effectively part of the estate or interest in the land or are 'intimately connected with' the interest are within the scope of indefeasibility.[145] Personal covenants which do not affect the estate or interest in the land are not 'indefeasible' simply because they are contained within a registered document.[146]

Statutory limitations may also be placed upon the scope of indefeasibility of a carbon sequestration agreement that is authorised under legislation. Indefeasibility will only be conferred upon a particular covenant of a registered carbon sequestration agreement if the covenant falls within the statutory limits prescribed for such an agreement. For example, the South Australian *Forest Property Act 2000* states that a carbon sequestration agreement may relate to, *inter alia*, the planting, maintenance and harvesting of forest vegetation, confer rights to enter land, deal with the duty of care to be exercised by each party to the other, and deal with incidental matters.[147] A clause conferring a right of access upon the project proponent would clearly fall within the statutory scope of this agreement. Conversely, a personal covenant which does not deal with either party's duty of care to the other may not. In addition to common law and statutory limitations on the scope of indefeasibility, other statutory enactments may affect the indefeasibility of a registered instrument. For example, overriding statutes may contain provisions that invalidate or modify the interest conferred by a registered instrument.[148] Finally, it may be possible to sever an invalid covenant in a registered instrument which does not fall within the scope of indefeasibility.[149]

It appears that carbon sequestration agreements in South Australia and Queensland will fall within category (c). In South Australia, the carbon sequestration agreement forms the carbon sequestration right itself, which is registered on the land title register.[150] In Queensland, a carbon sequestration agreement is attached as a schedule to the registered instrument creating the carbon sequestration right.[151] This is the same structure used for registration of leases and

[145] *Consolidated Trust Co v Naylor* (1936) 55 CLR 424 at 434. Expressed in another manner, this includes covenants that have a 'direct application' to the registered interest: *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 48.
[146] Bradbrook et al, above n 133, 214; *Consolidated Trust Co v Naylor* (1936) 55 CLR 424 at 434.
[147] *Forest Property Act 2000* (SA) s 6(2).
[148] See further B Edgeworth, 'Planning Law vs Property Law: Overriding Statutes and the Torrens System after *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*' (2008) 25 *EPLJ* 82; S Hepburn, 'Interpretive Strategies in the Overriding Legislation Exception to Indefeasibility' (2009) 21(2) *Bond LR* 86.
[149] Under the doctrine of severability: see Willmott et al, above n 138, 673-9; *Competition and Consumer Act 2010* (Cth) s 4L.
[150] *Forest Property Act 2000* (SA) s 7.
[151] Queensland Government, Land Registry Forms, *Form 36 Carbon Abatement Interest*, item 6 <http://www.derm.qld.gov.au/property/titles/forms.html>.

mortgages in Queensland[152] and consequently it appears that a carbon sequestration agreement will gain the benefits of indefeasibility to the same extent as do the terms of a registered lease or mortgage.[153] Consequently, in these states, the terms of a carbon sequestration agreement that fall within the scope of indefeasibility will gain the protection of indefeasibility including enforceability against successive landowners. This may involve a complicated exercise in determining which covenants of a carbon sequestration agreement are 'intimately connected with' the interest, or within the statutory limitations of the agreement, and which covenants fall outside the scope of indefeasibility.

Overall, determining the enforceability of a carbon sequestration agreement against successive landowners is likely to be a complicated legal exercise involving statutory interpretation. Due to this uncertainty, a carbon sequestration agreement should clearly and comprehensively set out requirements for the transfer of the project land. Prudent project proponents will include a clause requiring:
(a) the landowner to notify of any intended or actual sale of the project area;[154]
(b) the landowner to ensure that any successive landowner enters into a tripartite deed (with the project proponent and the original landowner) binding him or her to comply with all obligations under the original carbon sequestration agreement.

This will ensure that the terms of the carbon sequestration right and agreement remain enforceable against any successive landowner, and the project can continue to operate as originally intended.

5.2 Dealings with the Carbon Sequestration Right

The holder of a carbon sequestration right may wish to assign the right to a third party at some stage of the project. In this situation it will also be necessary to assign the benefit of the associated carbon sequestration agreement to the third party. A carbon sequestration agreement must contain provisions dealing with this situation, bearing in mind that each state has different legislative provisions regarding the transfer of a carbon sequestration right and any associated agreement.

---

[152] See Queensland Government, Land Registry Forms, *Form 2 Mortgage*, item 6 and *Form 7 Lease*, item 6 <http://www.derm.qld.gov.au/property/titles/forms.html>.
[153] Covenants in a registered lease or mortgage gain the protection of indefeasibility as long as they are effectively part of the estate or interest in the land or are 'intimately connected with' the interest: *Consolidated Trust Co v Naylor* (1936) 55 CLR 424 at 434. See also *Whenuapai Joinery (1988) Pty Ltd v Trust Bank Central Ltd* [1994] 1 NZLR 406 at 411; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1.
[154] This would include, for example, a requirement for notification upon listing for sale with real estate agent and a requirement for notification upon signing a contract for sale.

5.2.1 Enforceability of carbon sequestration right

Victorian, South Australian and Western Australian legislation expressly states that a carbon sequestration right may be transferred,[155] and New South Wales has a land titles form for the transfer of a registered carbon sequestration right.[156] Queensland and Tasmania do not appear to allow for transfer of a carbon sequestration right.[157] In these states, a carbon sequestration right could be transferred under the general transfer provisions of the land titles legislation.[158] It appears that a registered carbon sequestration right can be assigned in all states and will consequently be enforceable by and against any successive holders of the right.[159]

5.2.2 Enforceability of carbon sequestration agreement

State legislation generally does not provide for the transfer of a carbon sequestration agreement, except for Western Australian legislation.[160] In South Australia and Queensland it appears that a carbon sequestration agreement would automatically be transferred along with a carbon sequestration right.[161] The remaining states do not allow for transfer of an associated agreement. However the carbon sequestration agreement can be varied in Tasmania and New South Wales,[162] which would presumably allow variation to replace the original holder of the carbon sequestration right with the transferee. It is unclear whether this procedure would be effective to transfer the benefit of the carbon sequestration agreement to a third party. In Victoria, legislation does not allow variation of an existing agreement to add or remove a

[155] *Climate Change Act 2010* (Vic) s 26(8); *Transfer of Land Act 1893* (WA) ss 104D, 104J; *Forest Property Act 2000* (SA) ss 3, 8(2). Transfer of a carbon sequestration right in South Australia requires consent from the landowner, lessee and mortgagee (if any): *Forest Property Act 2000* (SA) s 8(2). Consent may be dispensed with if unreasonably withheld or there is other good reason (s 8(3)), and an assignee will succeed at law to all of the rights and obligations of the assignor under the agreement (s 8(6)).

[156] New South Wales Government, Land Title Dealing Forms, *Form 01TI: Transfer of a Profit à Prendre or Forestry Right* <http://www.lpi.nsw.gov.au/land_titles/dealing_forms/land_title_dealing_forms#T>.

[157] Queensland allows only for surrender of a carbon sequestration right: *Land Title Act 1994* (Qld) s 97U. Tasmanian legislation deems a carbon sequestration right to be a profit à prendre: *Forestry Rights Registration Act 1990* (Tas) s 5. There is no legislative provision or land titles form for transfer or variation of a profit à prendre to add or remove parties in either the *Land Titles Act 1980* (Tas) or *Forestry Rights Registration Act 1990* (Tas).

[158] *Land Title Act 1994* (Qld) s 60(1); *Land Titles Act 1980* (Tas) s 58(1). See also *Transfer of Land Act 1958* (Vic) s 45(1); *Real Property Act 1900* (NSW) s 46(1); *Real Property Act 1886* (SA) s 96; *Transfer of Land Act 1893* (WA) s 82(1). This is possible because the general transfer provisions can be used to transfer an estate or interest in land, and a carbon sequestration right is deemed to be an interest in land in every state. In South Australia a carbon sequestration right is deemed to be a profit à prendre for the purposes of transactions conducted under the *Real Property Act 1886*: *Forest Property Act 2000* (SA) ss 3, 12.

[159] As the registered proprietor of the carbon sequestration right, an assignee will be able to enforce the right.

[160] *Transfer of Land Act 1893* (WA) s 104J.

[161] This is because in South Australia the carbon sequestration agreement constitutes the right itself, and in Queensland the carbon sequestration agreement is attached as a schedule to the carbon sequestration right and a transfer of the carbon sequestration right will include a transfer of the schedule.

[162] *Conveyancing Act 1919* (NSW) s 88EA(6). In Tasmania, a carbon sequestration agreement includes a variation of any such agreement (impliedly states that the agreement may be varied): *Forestry Rights Registration Act 1990* (Tas) s 3.

party.[163] This would result in a situation where an existing Victorian carbon sequestration right can be transferred to a new holder, but the associated carbon sequestration agreement must be removed from the register[164] and a new agreement with the assignee executed and lodged in the register.[165]

The differences between state legislative provisions and uncertainty surrounding their operation will require careful drafting of a carbon sequestration agreement to allow transfer of a carbon sequestration right and any associated carbon sequestration agreement. An agreement should contain a clause providing that assignment of a carbon sequestration right is subject to the consent of the landowner, which cannot be unreasonably withheld. Consent to assignment may also be required from the landowner, lessee and mortgagee (if any) of the land.[166] Assignment of a carbon sequestration right should also be conditional upon entry into a tripartite deed of assignment between the landowner, the original holder of the carbon sequestration right and the assignee of the carbon sequestration right, which binds the assignee to comply with all of the obligations in the carbon sequestration agreement.[167]

A landowner will commonly require certain conditions to be met before the holder of the carbon sequestration right can assign the right. It is likely that a carbon sequestration right will be held for the purpose of conducting a project under the *Carbon Farming Act*.[168] This Act requires the holder of the right to meet certain criteria before they can become a project proponent, for example, he or she must be considered a 'fit and proper person' by the Clean Energy Regulator.[169] This is determined with regard to whether the proposed project proponent has breached certain Acts or committed certain offences.[170] Therefore a carbon sequestration agreement should place restrictions upon assignment of a carbon sequestration right to a person that does not meet the criteria outlined in the *Carbon Farming Act*. A landowner may also require certain other restrictions upon assignment, such as proof of financial viability of the proposed assignee, in order to protect their position.

Incidental matters relating to assignment of a carbon sequestration right must also be dealt with in the agreement. Assignment of a carbon sequestration right to a new holder will require variation of the 'declaration of eligible offsets project' under the *Carbon Farming Act*

[163] *Climate Change Act 2010* (Vic) s 34(2).
[164] *Climate Change Act 2010* (Vic) s 36.
[165] *Climate Change Act 2010* (Vic) s 32.
[166] South Australian legislation requires this: *Forest Property Act 2000* (SA) ss 3, 8(2). Consent may be dispensed with if unreasonably withheld or there is other good reason: s 8(3).
[167] An example of how this could be structured in practice is to attach a template of the tripartite deed of assignment as a schedule to the original agreement, along with a clause in the original agreement stating that upon assignment the assignee must enter into the attached tripartite deed.
[168] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 5 (a 'project proponent' must hold the carbon sequestration right over the project area).
[169] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 27(4)(f), 64(3)(a).
[170] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 64(3)(a).

to reflect the change in project proponent.[171] A carbon sequestration agreement must contain a clause requiring the original holder of the carbon sequestration right to apply for this variation, and to comply with any other procedural steps that accompany the application for variation.[172] An agreement must also be drafted to allow compliance with the relevant legislative procedure in all states. It will be necessary for an assignment of a carbon sequestration right to be in the proper form and itself registered before taking effect. The carbon sequestration agreement should require this procedure to be completed upon assignment.

6. Default and Termination

Rights of termination for a carbon sequestration right or associated agreement are not provided in state legislation. The carbon sequestration agreement must address grounds for termination and ultimately, in the event of termination, the removal of the carbon sequestration right from the register. First, grounds for termination may be generally grouped into the following categories:

(a) Agreement between the parties; or
(b) Termination upon buy-back of the amount of carbon credits issued for the project; or
(c) Termination upon default.

First, it is elementary that a contract or interest in land may be terminated by agreement between the parties. Legislation in South Australia and Victoria specifically acknowledges that termination of a carbon sequestration right or associated agreement (in Victoria) may occur by agreement between the parties.[173] It may also be practical to include a buy-back option in the agreement. For example, if the landowner wishes to end all restrictions upon the land prior to the end of the agreement, the landowner could be entitled to buy back all of the carbon credits issued thus far for the project and terminate it.[174] This aligns with the *Carbon Farming Act* provisions allowing for voluntary revocation of a biosequestration offsets project where all of the carbon credits that have been issued are surrendered.[175]

Most importantly, a carbon sequestration agreement should set out grounds for termination

---

[171] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 30; *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 3.17.
[172] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 30. For example the Regulator may require further information or for the applicant to provide security: ss 30(3)(h),(i).
[173] *Climate Change Act 2010* (Vic) s 35(2); *Forest Property Act 2000* (SA) s 10(1)(a). In South Australia, a carbon sequestration agreement must state the circumstances in which the agreement comes to an end or can be brought to an end: *Forest Property Act 2000* (SA) s 6 (1)(e).
[174] Australian Greenhouse Office, above n 7, 47.
[175] *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 32; *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth) r 3.23.

upon default. This would include a definition of events constituting default and an outline of the required procedure upon default. Firstly, because of the variety of possibilities around default, a properly drawn instrument would establish events of default which might include:

- any conduct of the project proponent; or
- any conduct of the project proponent's contractors (under the project proponent's control);

which leads to the relinquishment of 10% or more of the carbon credits issued for the project.

Events of default could also include either party becoming an insolvent under administration or an externally-administered body corporate,[176] failure to register the carbon sequestration right and associated agreement (if any) where registration is possible and necessary under State legislation,[177] knowingly or negligently providing information that is materially false or misleading to the other party,[178] a failure to deliver payment when due[179] or any other breach of a party's obligations under the agreement.

6.1 Procedure upon Default

Action to terminate the carbon sequestration right in the event of default by the project proponent might be hastened if a clause relating to default was incorporated in the agreement.[180] Given the practical consequences of serious default in an agreement granting an interest in land over such a lengthy period, every agreement would have to make provision for some form of notice to be served upon the defaulting party giving the party 'a reasonable time' to remedy the default failing which the agreement might be terminated. The length of the notice would depend upon the extent of the breach. Where the breach was deliberate, for example, where the project proponent set fire to the sink and totally destroyed it, there may not be the necessity for giving the notice or an opportunity to rectify but a right in the landowner to terminate the agreement immediately,[181] analogous to the instance of renunciation of a lease which might give rise to common law re-entry without a formal statutory Notice to Remedy Breach being required to be served.[182]

The requirement for a notice to remedy default recognises the demands of the law of equity

---

[176] See *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 64(3)(b)(c).
[177] Australian Greenhouse Office, above n 7, 46. It is possible to register or record a carbon sequestration right and agreement on the land title register in every State: *Land Title Act 1994* (Qld) s 97O; *Climate Change Act 2010* (Vic) ss 26, 32; *Conveyancing Act 1919* (NSW) ss 88AA, 88EA; *Forest Property Act 2000* (SA) s 7; *Forestry Rights Registration Act 1990* (Tas) ss 3, 5; *Carbon Rights Act 2003* (WA) ss 5, 11.
[178] Hawkins et al, above n 116, 15-16.
[179] Ibid 15-16.
[180] Examples of clauses dealing with default and termination of a carbon sequestration agreement are found in the following model agreement: California Climate Action Reserve, *Restrictive Covenant and Project Implementation Agreement* (Draft) cls 3,4 and 9 <http://www.climateactionreserve.org/how/program/documents/ >.
[181] This type of conduct would most likely amount to repudiation or breach of an essential term allowing the landowner to terminate the contract under common law principles: *Shevill v Builders Licencing Board* (1982) 42 ALR 305; *Honner v Ashton* [1979] 1 BPR 9478; *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.
[182] For example, *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319.

which would always allow a party to an agreement creating an interest in property a reasonable time to remedy a default when the consequences of failure might lead to a forfeiture of that property.[183] Time would not be of the essence in a carbon sequestration agreement and time to remedy a routine breach would have to be reasonably generous.

There are no legislative provisions for giving notices to remedy default as with leases[184] which provides that a 'reasonable time' must be given to the lessee for that purpose. Neither is there provision for giving the project proponent a 30 day notice, as with registered mortgages, to remedy a breach before exercising power of sale.[185] Likewise, there are no terms implied by statute into carbon sequestration agreements which address what steps might be taken upon default. It is clear that the loss of the carbon sequestration right by the project proponent would be a loss of an interest in the land[186] which may lead to other consequences beyond those relating directly to the loss of the interest. This fact arises as a result of carbon credits having been issued upon the basis of the existence of the carbon sequestration right.[187] Therefore it would be prudent to stipulate for some form of alternative dispute resolution to be undertaken as a precursor to taking curial action.[188]

6.2 Remedies and Removal from Title

In the majority of circumstances, an event of default will require notice of a breach to be given and a time period prescribed to afford an opportunity for the breach to be remedied before the carbon sequestration right can be terminated.

The termination of the carbon sequestration right, encapsulating the creation of a property interest, would also bring about the forfeiture of that property against which the right to relief might apply in appropriate circumstances. Such circumstances would not exist where the breach (or breaches) were wilful or deliberate, demonstrated disregard of the agreement over a period of time, where no attempt was made to remedy the breaches where they could have been, and where the loss to the project proponent is proportionate to the seriousness of the breach.[189] However, in the case of a trivial breach for which the landowner might be compensated adequately and which is easily remediable, relief may be given. Additionally, if the project proponent was extended the right to remedy the default within a reasonable time, and did not advantage that opportunity before the interest was forfeited, it is unlikely that the

---

183 *Stickney v Keeble* [1915] AC 386 at 415 per Lord Parker.
184 *Property Law Act 1974* (Qld) s 124 (1).
185 *Property Law Act 1974* (Qld) s 84.
186 Apart from South Australia, where it is unclear whether a carbon sequestration right is an interest in land.
187 Carbon credits may need to be relinquished if the carbon sequestration right is removed from the project area before 100 years have passed: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 37, 87, 89.
188 This is also recommended by the Australian Greenhouse Office in their guidance document *Planning Forest Sink Projects: A Guide to Legal, Taxation and Contractual Issues* (Commonwealth of Australia, 2005) at 47-48.
189 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 725 per Lord Wilberforce (HL).

necessary exceptional circumstances would be shown to grant relief against the forfeiture.[190] If a carbon sequestration agreement is successfully terminated, a remedies clause will then come into operation. Whilst technically an injunction might be sought for a threatened breach of the agreement or to restrain further breach[191] and, where appropriate, a mandatory injunction may lie to cure a breach where that is feasible, the main remedy would be damages where that is an adequate remedy.[192]

A remedies clause must take account of any consequences of termination arising under the provisions of the *Carbon Farming Act*. Upon termination of a carbon sequestration right, the declaration of eligible offsets project will be revoked under the *Carbon Farming Act*[193] and all of the carbon credits issued for the project must be surrendered.[194] The carbon sequestration agreement should clearly outline which party is responsible for surrendering the carbon credits or alternatively the proportion of carbon credits that must be surrendered by each party. Division of responsibility for surrendering carbon credits will depend upon the party responsible for default and subsequent termination of the agreement. Where the agreement is terminated because of one party's default or by mutual consent, it may also be prudent to include a clause providing for the parties to use their best endeavours to adopt a suitable method of determining their financial interests under the agreement.[195] The following issues would need to be considered in order to fairly compensate the party terminating for loss (including loss of profits) suffered by that party arising out of the other party's failure or breach: the maturity of the carbon pool; the amount of carbon sequestered; the impact of the destruction of some or all of the vegetation on carbon sequestration and emission rates; relevant levels of expenditure; projected profits; labour and expertise contributed by each party; and the nature and extent of the failure or breach.[196]

Additionally, where the carbon sequestration agreement terminates for any reason and certain improvements have been constructed by either party pursuant to the agreement, the issue of responsibility for 'make good' arises and in some cases, restoration of the site. These matters should also be dealt with expressly as they could be the subject of contention if not covered.

Once a carbon sequestration transaction has been terminated, the carbon sequestration right and associated agreement will need to be removed from the land title register. The agreement should contain provisions for the surrender of the right drafted in accordance with the relevant state legislation. For example, the Queensland *Land Title Act 1994* allows for the

---

190 *Legione v Hateley* (1983) 152 CLR 406 at 449.
191 *Doherty v Allman* (1878) 3 App Cas 709 at 719 per Lord Cairns.
192 See generally Bradbrook and MacCallum, above n 135, ch 18.
193 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5 (definition of 'project proponent'), 37.
194 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 37, 87.
195 Australian Greenhouse Office, above n 7, 47.
196 Ibid 47.

surrender of a carbon sequestration right by agreement and the registration of that surrender upon lodgment of an instrument of surrender.[197] Provision also exists for removal where the carbon sequestration right expires through effluxion of time or by the fulfilment of a condition to which its continuation is subject.[198] However, no provision exists for the removal of the right consequent upon termination following breach by one of the parties. Elaborate provisions exist for the removal of registered leases where re-entry is effected following breach.[199] There is no such mechanism in the *Land Title Act* where a carbon sequestration agreement is breached and the breach is one which permits the innocent party to accept it as a repudiation of the agreement. The mere production of a document signed by one of the parties evidencing the termination of the agreement may not suffice. Of course, a court order declaring this may be a different matter as this could be produced with a General Request asking for the interest to be removed.

Other states also do not provide for removal of a carbon sequestration right or associated agreement from the land title register following default. In a number of States the written consent of both parties is required before an instrument of surrender can be lodged.[200] In Victoria and New South Wales, the legislation does not provide for surrender of a carbon sequestration right although the lodgment of a general request to remove (or equivalent) accompanied by written consent of both parties would presumably effect removal.[201]

To overcome the lack of legislative detail in all states, the carbon sequestration agreement could outline a specific procedure allowing removal from the title upon default. The project proponent would have to give the landowner a power of attorney (to be exercised only where the agreement had been terminated) to authorise the landowner to execute an instrument of surrender. The instrument of surrender should be supported by suitable evidence of default and the landowner's statement that the breach thereby constituted a repudiation of the carbon sequestration agreement, resulting in the forfeiture of the interest.

In most States, a power of attorney may authorise the attorney to do for the donor that which

---

[197] *Land Title Act 1994* (Qld) s 97U(1). Queensland Government, Land Registry Forms, *Form 37 Surrender of Carbon Abatement Interest* <http://www.derm.qld.gov.au/property/titles/forms.html>.

[198] *Land Title Act 1994* (Qld) s 97U(3).

[199] *Land Title Act 1994* (Qld) s 68.

[200] *Transfer of Land Act 1893* (WA) ss 104F, 104L (an instrument of surrender must be executed by the holder of the right); *Climate Change Act 2010* (Vic) ss 35, 36; *Land Titles Act 1980* (Tas) s 108; *Conveyancing Act 1919* (NSW) s 88EA(6). See also Victorian Government, Climate Change Act Forms, *Application to Remove a Forestry and Carbon Management Agreement* <http://www.dse.vic.gov.au/property-titles-and-maps/land-titles-home/forms-guides-and-fees#Climate_Change_Act_forms>; Tasmanian Online Land Dealings, *Form FRR: Instrument Releasing Registered Forestry Right* <http://www.thelist.tas.gov.au/told/faces/jsp/contents.jsp>.

[201] See, for example, New South Wales Government, Land Title Dealing Forms, *Form 11R: Request* <http://www.lpi.nsw.gov.au/land_titles/dealing_forms/land_title_dealing_forms#R>.

the donor can lawfully do by an attorney,[202] including an authorisation for the attorney to execute an instrument on behalf of the donor.[203] This type of power of attorney would allow for execution of an instrument of surrender by the landowner on behalf of the project proponent. Some states require registration of a power of attorney before an instrument executed under the power of attorney can be registered on the land title register.[204] Victoria and Western Australia do not require this, although a power of attorney may be filed in the Western Australian register.[205]

A power of attorney granted to the landowner should be expressed in terms of 'the landowner and all who succeed in title from the landowner'. It is unclear from most state legislation whether a power of attorney can be granted to a class of persons. In Tasmania an attorney may be appointed as a member of a specified class of persons,[206] and in Queensland there may be one or more attorneys appointed by name, or as the holder of a specified office, by reference to the title of the office.[207] All other state legislation is silent on the matter.[208]

Despite the uncertainty surrounding state power of attorney legislation, the landowner should consider the incorporation of a well-drafted power of attorney clause within the carbon sequestration agreement. The clause should specifically authorize the landowner to execute an instrument of surrender on behalf of the project proponent in the event of termination. It should also require registration of the power of attorney where this is possible. Finally, the power of attorney should be granted to the landowner and their successors, to enable removal of the carbon sequestration right from the register upon termination at any stage of the

---

[202] *Instruments Act 1958* (Vic) s 107; *Powers of Attorney and Agency Act 1984* (SA) s 5(3); *Powers Of Attorney Act 1998* (Qld) s 8(1); *Powers of Attorney Act 2003* (NSW) s 9; *Powers of Attorney Act 2000* (Tas) s 18. In Western Australia the proprietor of land may appoint any person to act for him in transferring or dealing with the land: *Transfer of Land Act 1893* (WA) s 143(1). 'Land' includes messuages, tenements and hereditaments corporeal or incorporeal in freehold and Crown land: *Transfer of Land Act 1893* (WA) s 4. A carbon right is a hereditament over the land: *Carbon Rights Act 2003* (WA) s 6(3). Therefore it appears the holder of a carbon sequestration right may grant a power of attorney authorizing transfer or dealings with the carbon sequestration right.

[203] *Instruments Act 1958* (Vic) s 108(1); *Real Property Act 1886* (SA) s 155; *Property Law Act 1969* (WA) s 84(1); *Powers of Attorney Act 2000* (Tas) s 20; *Powers of Attorney Act 2003* (NSW) s 43. In Queensland the power to execute an instrument arises 'if necessary or convenient for the exercise of power given to an attorney': *Powers Of Attorney Act 1998* (Qld) s 69.

[204] *Land Title Act 1994* (Qld) s 132; *Real Property Act 1900* (NSW) ss 3, 36(2); *Powers of Attorney Act 2000* (Tas) s 16. South Australian legislation does not specifically state this but requires a power of attorney to be filed in the land title registry: *Real Property Act 1886* (SA) s 156.

[205] *Transfer of Land Act 1893* (WA) s 143(1A); *Registration of Deeds Act 1856* (WA) s 13. Victorian legislation contains no provisions for registration of a power of attorney.

[206] *Powers of Attorney Act 2000* (Tas) s 26.

[207] *Powers Of Attorney Act 1998* (Qld) s 13. 'Office' includes position: *Acts Interpretation Act 1954* (Qld) s 36. The power of attorney must specify whether the attorneys are appointed jointly or severally: *Powers Of Attorney Act 1998* (Qld) s 13(1)(a).

[208] However the general rule of interpreting statutes is that the singular includes the plural: *Acts Interpretation Act 1954* (Qld) s 32C; *Interpretation of Legislation Act 1984* (Vic) s 37(c); *Interpretation Act 1987* (NSW) s 8(b); *Interpretation Act 1984* (WA) s 10(c); *Acts Interpretation Act 1915* (SA) s 26(b); *Acts Interpretation Act 1931* (Tas) s 24(d). This would suggest that more than one attorney can be appointed under state legislation. Furthermore, no state legislation prohibits the appointment of a class of persons as an attorney. See further B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (The Federation Press, 1992) 212-217.

project.

In all states, the abovementioned procedure involving the use of a power of attorney may need to be outlined in a carbon sequestration agreement. When drafting the agreement, the legislative provisions must be considered on an individual basis to facilitate the most efficient method of removal from the register upon termination of the agreement following default.

7. Conclusion

Drafting of a carbon sequestration agreement will prove a challenging exercise in any jurisdiction. The contents of an agreement are the main source of rights and obligations of parties involved in a biosequestration offsets project, and therefore a well-drafted agreement is integral to the successful operation of the project. A carbon sequestration agreement must also deal with allocating the significant risks that are associated with a biosequestration offsets project. Most notably there is the risk that reversal of sequestered carbon may result in significant financial penalties for the project proponent, and ultimately, severe restrictions on the landowner's property in the form of a carbon maintenance obligation. Furthermore, unlike an interest in land such as a lease or mortgage, a carbon sequestration right supporting a biosequestration offsets project cannot be removed from the land without significant financial consequences.[209] Risks arising from biosequestration offsets projects could also impact upon other parties such as mortgagees, whose main concern is the marketability of the land. Marketability may be severely impacted by the existence of the biosequestration offsets project itself and potentially, in extreme circumstances, the imposition of a carbon maintenance obligation over the land. A mortgagee may conclude that the risks arising from a proposed project are unacceptable and cannot be managed by contract.

In any case, each party to a carbon sequestration agreement must ensure that it includes terms sufficient to manage their own liability and protect their own interests. It is likely that an agreement will be drafted by the project proponent and presented to the landowner for approval. In this situation a landowner, and any mortgagee of the land, must be especially vigilant to ensure that the agreement is drafted in terms that will not prove unfavourable to them. Landowners may also want to consider the inclusion of terms that provide a method of terminating the project without adverse financial consequences. For example an agreement could provide a landowner with a compulsory 'buy-out' option in the event of imposition of a carbon maintenance obligation, requiring the project proponent to acquire the land at its market value prior to imposition of the carbon maintenance obligation.

[209] In the form of mandatory relinquishment of all carbon credits issued for project: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5 (definition of 'project proponent'), 37, 89.

Another significant challenge to the drafting of a carbon sequestration agreement is the lack of detail provided by state legislation on matters such as removal of a carbon sequestration right from the land title register and enforceability of a carbon sequestration agreement against a successive landowner. State legislation on these matters is fragmented and inconsistent and it is left to the competence of the legal practitioner drafting the agreement to fill the legislative gaps. Parties will therefore need to retain competent legal representation to ensure that a carbon sequestration agreement is drafted to cover all necessary bases.