

# Customer Information Bulletin

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## 1 INTRODUCTION

### 1.1 Background

A summary of the *Carbon Rights Act 2003* and the *Tree Plantation Agreements Act 2003* is set out below. The registration of these new interests in land shown on the title to the land is achieved by consequential amendments to the *Transfer of Land Act 1893* (TLA) in the *Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act 2003*. The above Acts and the consequential amendments to the *Transfer of Land Act* and *Stamp Act* will be proclaimed within the next few weeks. This Bulletin serves as an early advice of some of the proposed changes.

- The *Carbon Rights Act 2003* – provides for the creation of certain interests in land in relation to the effects of carbon sequestration from, and carbon release to, the atmosphere etc.
- The *Tree Plantation Agreements Act 2003* – provides for the making of certain agreements, and for the creation of certain interests in land, in relation to tree plantations etc.
- The *Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act 2003* - amends the *Land Administration Act 1997* (LAA), the *Soil and Land Conservation Act 1945*, the *Taxation Administration Act 2003* and the *Transfer of Land Act 1893* in relation to matters arising from the *Carbon Rights Act 2003* and *Tree Plantation Agreements Act 2003*.

The registration of these new interests in land shown on land titles is achieved by consequential amendments to the TLA of which the following are the most notable:

- Carbon Right interests in land, Carbon Covenant interests in land and Plantation interests in land by the registration of an “Instrument”, in the “approved form” pursuant to the TLA. It is to be noted that such interest in land may also be created on the registration of a Deed under the *Registration of Deeds Act*:

- The term “Proprietor” in the TLA has been amended to include the holder of Carbon Right, Carbon Covenant or Plantation interests in land.
- Carbon Right, Carbon Covenant or Plantation interests in land will not be removed from title on mortgagees power of sale of the land under section 110 of TLA because any prior registered mortgagee must consent to the creating of such interests in land. This is further reinforced by the consequential amendments to section 129A (1) of TLA.
- A caveat may be lodged by a person claiming Carbon Right, Carbon Covenant or Plantation interests in land under section 137 of TLA.

However, both the Carbon Rights Act, and the Tree Plantation Agreements Act must be read in conjunction with the provisions of the TLA in order to ascertain the dealing types that may be lodged or registered in relation to these new interests in land. Summaries of other registration matters are included in the attachments titled:

- Carbon Rights
- Carbon Covenants
- Plantation Interest

## 1.2 Carbon Rights Act 2003

The establishment of Greenhouse gas targets (as contemplated under the Kyoto Protocol) are complemented by the establishment of, and trade in, carbon credits. The *Carbon Rights Act* provides statutory recognition of “carbon rights”.

It is hoped that once land owners are provided with a legal framework for allocating or sharing financial benefits from carbon sinks (the amount of carbon stored in land), there will be an increase in land use, land use change and forestry activities which sequester carbon, as anticipated by the Kyoto Protocol. This will assist Australia, as a whole, in complying with its international Greenhouse obligations as stated under the United Nations Framework Convention on Climate Change.

Carbon rights are the combination of the rights arising from the storage of carbon in, and the risks associated with the release of carbon from, plants or soil as a result of changes to land management practices.

Carbon Rights legislation will create a new right in land that will be registered on the certificate of title to the land. This right, which can apply to either freehold or Crown land, will remain on the title until such time as it is surrendered.

The Carbon Rights in Crown land will remain owned by the Crown unless transferred to another person.

Once the carbon rights have been registered on title, those rights exist at law and have the benefit of priority and indefeasibility under the TLA. Even though the existence of these rights is guaranteed, their value is not and the State has no involvement in determining their value. Their value will be determined by the “market”, in the same way that the value of other interests in land are determined under the TLA.

The creation of carbon rights in this way will provide:

- (a) legal certainty as to the nature of the right, which will value add to carbon rights and increase use of the proposed international carbon accounting system;



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

“Carbon Covenants” (which may be positive or negative in nature) may also be registered on the certificate of title. These will be used as a control mechanism to ensure the continuation of the trees or other land-based resource underlying or providing the carbon sequestration. This will affect landowners and others who have an interest in that land (eg. a lease, mortgage, profit a prendre), who agree to give a covenant in favour of the holder of the carbon right.

It is hoped that the legal nature of the carbon rights will be such that ultimately investment schemes may be attracted to Western Australia that will help reduce its gas emissions, help overcome land degradation, protect biodiversity and promote sustainability.

This is the first legislation in Australia to go this far – both as to the scope of its application to all land and the creation of carbon rights as a new separate interest in land. It gives effect to contractual arrangements that have been in existence in the private sector (especially in the timber industry) for a number of years.

### 1.3 Tree Plantation Agreements Act 2003

The *Tree Plantation Agreements Act* is complementary to, but independent from, *the Carbon Rights Act*. The *Tree Plantation Agreements Act 2003* is not yet law but is to be proclaimed in the next few weeks.

This Act provides for the creation of a plantation interest, as a separate interest in land, on registration of a tree plantation agreement on the certificate of title. It is akin to the common law profit a prendre. However, it goes further in that it:

- allows for the planting, management and harvesting of trees on another person’s land; and
- separates ownership in the trees from the land.

It applies and extends the principles under the *Conservation and Land Management Act 1984* (CALM Act), in relation to timber sharefarming agreements, to private land and the private timber industry. It streamlines the process by allowing land owners and tree plantation companies to create a direct proprietary relationship in relation to the land and the trees, which will run with the land for the life of the plantation. The Executive Director of CALM is not required to be an intermediary in the process in the way that he is under a timber sharefarming agreement.

A tree plantation agreement may only be registered over freehold land or a leasehold interest in freehold or Crown land. The management of tree plantations and forestry activities on Crown land are controlled by the Forest Products Commission under the *Forest Products Act 2000*.

A land owner’s activities in relation to the trees and the surrounding land can be controlled by rights and obligations of the parties (positive and negative), which are registered as part of the tree plantation agreement on the certificate of title.

The plantation interest in the land, and the underlying rights and obligations of the parties in the tree plantation agreement, will have the benefit of the priority and indefeasibility provisions in the TLA.

It provides an alternative legal mechanism (to timber sharefarming agreements via the CALM Act or fixed term leases) for the private timber industry to secure its investment in trees on privately owned land.

## 2 CARBON RIGHTS ACT (“CRA”)

### 2.1 Carbon Rights

The following summarises the registration requirements for “Carbon Rights” under the CRA and the consequential amendments to the LAA and the TLA.

**“Definition”** – A Carbon Right interest in land is created when a “Carbon Right Form” is registered under the TLA in favour of a legal entity. The State of Western Australia (under section 18 of LAA) may be registered as the proprietor of a Carbon Right in respect of Crown Land and may deal with such rights by the Minister for Planning & Infrastructure.

A Carbon Right interest in land may be created by the registered proprietor of:

- land, or
- a lessee's interest in freehold or Crown land, or
- a grantee's interest in a Profit a Prendre' under the LAA, or
- a grantee's interest in a Timber Share-farming Agreement under the CALM Act, or
- Crown Land.

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

A Carbon Right Form cannot be registered unless:

- It is in a form approved by the Registrar of Titles;
- It contains a statement that it is for the creation of a Carbon Right under the CRA;
- It contains a land description for the freehold land or Crown land in respect of which the carbon right is created (if only part of the land in a title is affected then a Deposited Plan and CSD file of the affected land is required);
- It specifies the term of the proposed Carbon Right (which may be in perpetuity); and
- It complies with section 104B of TLA (all written consents and the payment of fees).

Once registered a Carbon Right Form is an instrument under the TLA and can be dealt with as a separate interest, except that it cannot be varied.

Every Carbon Right instrument will be endorsed on title as a “Primary Interest” in the land. If the land affected by the Carbon Right is only part of the land in a title then a Deposited Plan and CSD file of the affected land is required to be lodged to support the Carbon Right Instrument, unless a narrative description will suffice - for example, as to the portion of land depicted on Deposited Plan... lodged to support Plantation Interest G12345. There is a need for certainty of description of the area of land affected by a Carbon Right as only one Carbon Right Instrument can be registered over any particular piece of land – carbon rights cannot overlap each other.

The endorsement in the Second Schedule of the title will read:

“1123456 Carbon Right Interest to (..name, address and tenancy..) (.. “as to portion only – see Deposited Plan...” or “as to Lease G12345”) registered.....”.

The following new registration forms have been approved to facilitate dealings with a Carbon Right interest under the CRA and TLA. All will be entered in the Second Schedule of the title as a “Subsidiary Interest”, for example:

- Transfer of Carbon Right:

“112345” Transfer of Carbon Right I..... proprietor now (..name, address and tenancy..) registered.....”.

- Extension of Carbon Right:

“112345” Extension of Carbon Right I..... registered.....”

- Surrender of Carbon Right – The effect of a total surrender of Carbon Right would be the removal of the relevant Carbon Right from the title.

## 2.2 Carbon Covenants

The following summarises the registration requirements for “Carbon Covenants” under the CRA and the consequential amendments to the TLA.

**“Definition”** – A Carbon Covenant interest in land is created when a “Carbon Covenant Form” is registered under the TLA in favour of a legal entity who may or may not be the same person being burdened by the covenants.

A proprietor of a Carbon Covenant may, in relation to any matter affecting carbon sequestration or carbon release occurring in relation to affected land, enter into a covenant with one or more persons having an interest in land. The Carbon Covenant can be a right or obligation, which may include a positive covenant or a restriction to in relation to land.

The proprietor of the Carbon Covenant **must at all times** be the proprietor of the relevant Carbon Right and covenants will be for the benefit the Carbon Right Interest in the land. Carbon covenants will be used as a control mechanism to ensure the continuation of the trees or other land-based resource underlying or providing the carbon sequestration (ie. to maintain and protect trees, not to diminish water supply, not to cut timber etc.). The burden of the Carbon covenants may affect adjoining landowners and/or proprietors of other interests in land affected by a Carbon Right (eg. the proprietor of the land itself, or a lease, or a timber share-farming agreement, or a profit a prendre etc.), who agree to give a covenant in favour of the holder of the carbon right.

A Carbon Covenant Form cannot be registered unless:

- It is in a form approved by the Registrar of Titles;
- It contains a statement that it is for the creation of a Carbon Covenant under the CRA;
- It contains a description of the Carbon Right in relation to which the proposed Carbon Covenant is to be created (if burdens only part of the land in a title then a Deposited Plan will be required);
- It contains the terms, obligation or restriction that is the subject of the proposed Carbon Covenant;
- The proprietor of the Carbon Right will be the proprietor of the relevant Carbon Covenant;
- It specifies the day on which the Carbon Covenant is to commence (which cannot be before the relevant Carbon Right is created, and cannot be longer than the term of the relevant Carbon Right); and
- It complies with section 104G of TLA (all written consents and the payment of fees).

Once registered a Carbon Covenant Form is an instrument under the TLA and can be dealt with as a separate interest and be the subject of a caveat or process of execution.

Every Carbon Covenant instrument will be endorsed on title as a "Subsidiary Interest" to the relevant Carbon Right in the Second Schedule of the title. The Carbon Covenant must be for the benefit of the entire extent of the Carbon Right, However, the Carbon Covenant may burden only part of the land in a title, in which case it must be supported by a Deposited Plan, unless a narrative description will suffice.

The endorsement in the Second Schedule of the title will read:

"1123456 Carbon Covenant Benefit to (.. name, address and tenancy..) (.. "as to portion only – see Deposited Plan....") registered.....".

The following new registration forms have been approved to facilitate dealings with a Carbon Covenant interest under the CRA and TLA. All will be entered in the Second Schedule of the title as a "Subsidiary Interest", for example:

- Transfer of Carbon Covenant:

"112345" Transfer of Carbon Covenant I..... proprietor now (.. name, address and tenancy..) registered.....".

- Extension of Carbon Covenant:

"112345" Extension of Carbon Covenant I..... registered....."

- Variation of Carbon Covenant:

"112345 Variation of Carbon Covenant I .....registered....."

- Surrender of Carbon Covenant – The effect of a total surrender of Carbon Covenant would be the removal of the relevant Carbon Covenant from the title of both the benefited and burdened land.

Where the Carbon Covenant burdens the land in a title it will be shown as a “Primary Interest” in the Second Schedule of the title in order of priority. Where the Carbon Covenant burdens a lesser interest in land it will be shown as a “Subsidiary Interest” in the Second Schedule of the title relevant to the lease, timber share-farming agreement or profit a prendre etc. The land or interest in land burdened by a Carbon Covenant will be endorsed as follows:

“112345” Carbon Covenant Burden – Benefit to ..... name, address and tenancy..) (.. “as to portion only – see Deposited Plan...” registered.....”.

Upon the transfer of the Carbon Covenant the proprietorship of the Carbon Covenant - Benefit (as discussed above) will be updated and the proprietorship of the Carbon Covenant - Burden will be updated on the burdened land with a “Subsidiary” endorsement as follows:

“112345” Transfer of Carbon Covenant – Benefit proprietor now ..... name, address and tenancy..) registered.....”.

### 3 TREE PLANTATION AGREEMENTS ACT 2003 (“TPA”)

The following summarises the registration requirements for “Plantation Interests” under the TPA and the consequential amendments to the TLA.

“**Definition**” – A Plantation Interest in land is created when a “Tree Plantation Agreement” is registered in relation to freehold land, a lease of freehold or a lease of Crown land under the TLA in favour of a legal entity who agrees to:

- establish a plantation;
- maintain a plantation; or
- harvest products from a plantation.

A Tree Plantation Agreement must:

- Be in writing and state that it is an agreement under the TPA;
- State the term of the agreement and the day on which it commences; and
- Contain a land description for the freehold or leasehold of freehold land or the Crown land in respect of which plantation interest is created (if only part of the land in a title then by a Deposited Plan and CSD file of the affected land is required);

Once registered a Tree Plantation Agreement is an instrument under the TLA and can be dealt with as a separate interest and be the subject of a caveat or process of execution. A Tree Plantation Agreement is an instrument under the TLA even though the trees are affixed to the agreement land.

Where the Plantation Interest burdens the land in a title it will be shown as a “Primary Interest” in the Second Schedule of the title in order of priority. Where the Plantation Interest burdens a lessee's interest in freehold or Crown land it will be shown as a “Subsidiary Interest” in the Second Schedule of the title relevant to the lease. Plantation Interest will be endorsed as follows:

“112345” Plantation Interest to (.. name, address and tenancy..) (.. “as to portion only – see Deposited Plan...” registered.....”.

The following new registration forms have been approved to facilitate dealings with a Plantation Interest under the TPA and TLA. All will be entered in the Second Schedule of the title as a “Subsidiary Interest”, for example:

- Transfer of Plantation Interest:

“112345” Transfer of Plantation Interest I..... proprietor now (.. name, address and tenancy..) registered.....”.

- Extension of Plantation Interest:

“112345” Extension of Plantation Interest I..... registered.....”

- Variation of Plantation Interest:

“112345 Variation of Plantation Interest I .....registered.....”

- Surrender of Plantation Interest – The effect of a total surrender of Plantation Interest would be the removal of the relevant Plantation Interest from the title.

#### **4 FURTHER REGISTRATION MATTERS – CARBON CREDITS – TREE PLANTATION AGREEMENTS**

1. While specific “Approved Forms” have been designed for the new interests in land contemplated by these new Acts any other dealings with these interests will be registered utilising existing forms, for example the A4 Survivorship Application, A3 Transmission Application and C1 Caveat form.
2. The following consequential amendments to the Stamp Act made by the Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act provide that no stamp duty will be payable on:
  - the creation of timber sharefarming agreements under the CALM Act or *the Forest Products Act 2000*;
  - the creation of plantation interest under a tree plantation agreement under the *Tree Plantation Agreements Act 2003*.

Any subsequent dealing with a timber sharefarming agreement or tree plantation agreement (eg. a transfer) will be subject to duty in the normal way (eg ad valorem if the transfer is for consideration). Nominal stamp duty is also payable on Surrender documents.

**BRUCE ROBERTS**  
**REGISTRAR OF TITLES**  
**A/MANAGER**  
**REGISTRATION SERVICES**  
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