

WA Government opens door to carbon sequestration on pastoral leases

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We are pleased to see that the WA Government has provided in-principle support for eligible pastoral lessees to register certain carbon sequestration projects under the Commonwealth Government's \$2.55 billion Emission Reduction Fund (**ERF**) over pastoral land.¹ This support will potentially allow pastoralists to use grazing strategies to increase regeneration of native vegetation and therefore extract carbon dioxide from the atmosphere.² If successful, pastoral lessees have the opportunity to diversify their business and create an additional income stream.

The Emissions Reduction Fund

The ERF is administered by the Clean Energy Regulator (**CER**), which issues Australia carbon credit units (**ACCUs**) to carbon reduction projects that are declared eligible offsets projects under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (**the Act**).³

If declared eligible, project owners may sell their ACCUs to private sector purchasers seeking to reduce their emissions or enter into a contract with CER for the sale of ACCUs to the Commonwealth.⁴ Contracts with CER are currently awarded through a reverse auction or tender process, where the winner is the bidder who can provide ACCUs at the lowest cost to the Commonwealth.⁵ The next auction is scheduled for 6-7 June 2018, with the project registration deadline having recently ended on 20 April 2018.⁶

In-principle agreement and criteria

Despite the in-principle support from the WA Government, it does not amount to the State providing the 'eligible interest holder consent' required by the ERF. Instead, the State will consider eligible projects over the next 12 months to determine whether consent will be provided.⁷ A project without that consent will not receive any ACCUs.⁸ This creates uncertainty for pastoral lessees considering carbon sequestration so any pastoralist needs to be aware that the WA Government may revoke that consent.

The criteria set by the WA Government for in-principle support include:

- The project is conducted on an existing pastoral lease, having a term of at least 25 years.
- The project proponent is the pastoral lessee and not a third party.
- The project involves the use of grazing management techniques and the Human Induced Regeneration project methodology is applied.
- The permanence period of the project is 25 years.⁹

A further requirement is "consistency with the terms of the pastoral lease, native title obligations and impact on mining".¹⁰

Issues

We consider that there are various issues raised by the approval of further reforms and legislative

changes will be needed.

It is estimated that 21% of pastoral leases are currently ineligible¹¹ from participating in the ERF because of the 25 year permanence requirement.

It is uncertain if a carbon sequestration project (which limits grazing) is consistent with the terms of a pastoral lease particularly given the High Court decision in *Ward*¹² which held that the holder of a pastoral lease was restricted to using the land only for 'pastoral purposes' and obtained no right to the soil or to timber except for those limited purposes.

The interaction with mining and exploration raises at least the following two questions which will be of concern to the pastoral and mining industry in WA:

1. Would a miner have to compensate the pastoralist (under the compensation provisions of the *Mining Act 1978* (WA)) for any loss of ACCUs caused by the miner conducting exploration or mining?
2. Will carbon sequestration activities constitute a cultivated field or plantation within the meaning of section 20(5) of the *Mining Act 1978* (WA), therefore requiring a miner or explorer to obtain the consent of the pastoralist before they could conduct activities on or within 100m of the area used for the carbon project?

While support for carbon sequestration on pastoral leases is a positive step forward, the WA Government is yet to provide certainty to pastoral lessees and must do more to clarify the interaction between carbon sequestration activities, the *Native Title Act* (1993) (Cth), *Land Administration Act* 1997 (WA) and the *Mining Act 1978* (WA).

HopgoodGanim Lawyers recently advised a client with pastoral and mining interests on the legal implications of carbon farming on a pastoral lease.

For more information or discussion, please contact our [Resources and Energy](#) team.

1. Department of Primary Industries and Regional Development, Government of Western Australia, 'Unlocking carbon potential for pastoralists' (Media Release, 18 April 2018). Media Release, 2018.

2. Ibid.

3. Act ss 5, 11(2), 11(3), 27, 147.

4. Ibid ss 20B(1), 151; Department of the Environment and Energy, Australian Government, The Emissions Reduction Fund: Crediting Department of Environment and Energy, ERF: crediting.

5. Clean Energy Regulator, Australian Government, Auction format (12 October 2017) ERF Website.

6. Clean Energy Regulator, Australian Government, Participating in an auction (15 March 2018) ERF Website

7. Department of Primary Industries and Regional Development, Government of Western Australia, Carbon Farming Potential for Pastoralists <https://agric.wa.gov.au/n/7018>

8. Act s 15(2); Clean Energy Regulator, Australian Government, Eligible Interest Holder Consent (30 November 2017) ERF Website.

9. Above n 7.

10. Above n 7.

11. Courtney Fowler, Michelle Stanley and Tara de Landgraft, 'Multi-billion-dollar potential for Western Australia's carbon farming industry', ABC News (online), 20 April 2018 ABC Article,

2018

12. Western Australia v Ward [2002] 213 CLR 1 at [180].

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