

South Australia

Forest Property (Carbon Rights) Amendment Act 2006

An Act to amend the *Forest Property Act 2000*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Forest Property (Carbon Rights) Amendment Act 2006*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Forest Property Act 2000*

4—Amendment of section 3—Interpretation

- (1) Section 3—before the definition of *Court* insert:
carbon right—see section 3A;
- (2) Section 3, definition of *forest vegetation*—delete "but does not include edible fruit"
- (3) Section 3, definition of *forest property owner*—delete the definition

5—Insertion of section 3A

After section 3 insert:

3A—Carbon absorption capacity of the forest vegetation to be a form of property

- (1) The capacity of forest vegetation to absorb carbon from the atmosphere is a form of property (a *carbon right*) in the nature of a chose in action.
- (2) A carbon right attaches to the forest vegetation to which it relates, and ownership of the right passes with ownership of the forest vegetation unless ownership of the right is separated from ownership of the forest vegetation under a forest property agreement.
- (3) A forest property agreement may relate to carbon rights in respect of the past absorption of carbon from the atmosphere as well as to those in respect of the absorption of carbon from the atmosphere during the currency of the agreement.

6—Substitution of Part 2

Part 2 (comprising sections 5 to 15)—delete and substitute:

Part 2—Forest property agreements

5—Types of forest property agreements

- (1) Forest property agreements are of 2 types—
 - (a) forest property (vegetation) agreements; and
 - (b) forest property (carbon rights) agreements.
- (2) A forest property (vegetation) agreement separates ownership of forest vegetation from ownership of the land on which the vegetation is growing, or is to be grown, by transferring ownership of the forest vegetation from the owner of the land (the *transferor*) to another (the *transferee*) without severance of the vegetation from the land.

- (3) A forest property (carbon rights) agreement separates ownership of carbon rights from ownership of the vegetation to which the carbon rights relate by transferring ownership of the carbon rights from the owner of the vegetation (the *transferor*) to another (the *transferee*).
- (4) A forest property (vegetation) agreement may reserve to the transferor the right to take edible fruits from the forest vegetation.
- (5) If ownership of land has been, or is to be, separated from ownership of forest vegetation growing or to be grown on the land, a forest property (carbon rights) agreement may only be made if both the owner of the land and the owner, or prospective owner, of the forest vegetation are parties to the agreement.
- (6) If the owner of land on which forest vegetation is growing or is to be grown has entered into, or is about to enter into, a forest property (carbon rights) agreement, a forest property (vegetation) agreement separating ownership of the land from ownership of the forest vegetation may only be made if both the owner of the land and the owner, or prospective owner, of the carbon rights are parties to the agreement.
- (7) A forest property agreement may take the form of a declaration of trust and, in that case, a reference to the transferor is a reference to the owner of the relevant land or forest vegetation as settlor and a reference to the transferee is a reference to the owner in his or her capacity as trustee under the trust.

6—Form and content of forest property agreement

- (1) A forest property agreement—
 - (a) must be in writing; and
 - (b) must state that it is made under this Act; and
 - (c) must identify the land to which it applies; and
 - (d) must describe present and future forest vegetation to which it applies with sufficient particularity to enable it to be clearly identified; and
 - (e) must state—
 - (i) if the agreement is made for a specific term—the term of the agreement; and
 - (ii) the circumstances in which the agreement comes to an end or can be brought to an end; and
 - (f) must comply with any requirements prescribed by regulation.
- (2) A forest property agreement may—
 - (a) require or permit any party to the agreement to take, or refrain from, specified action relating to the planting, cultivation, maintenance, care, harvesting, destruction or removal of forest vegetation; and

- (b) confer on the transferee a right to enter the land to inspect the forest vegetation and to exercise rights, or carry out obligations, relating to the forest vegetation; and
 - (c) deal with the duty of care to be exercised by each party to the other; and
 - (d) deal with incidental matters.
- (3) The following consents are required for the making of a forest property agreement—
 - (a) in the case of a forest property agreement conferring ownership of vegetation—the holder of any registered encumbrance over the land must consent to the agreement; and
 - (b) in the case of a forest property agreement conferring ownership of carbon rights—
 - (i) the holder of a registered encumbrance over the land; and
 - (ii) the holder of any registered mortgage or charge over the vegetation,must consent to the agreement.
- (4) However, the Court may dispense with a consent under subsection (3) on the ground that—
 - (a) the consent has been unreasonably withheld; or
 - (b) there is some other good reason to dispense with it.
- (5) A forest property agreement is ineffective unless the consents required under this section have been obtained or dispensed with.

7—Registration of forest property agreement

- (1) A forest property agreement may be registered.
- (2) If a forest property agreement is unregistered, the interest of the transferee is an equitable interest and therefore liable to be defeated by a purchaser who acquires an interest in the subject matter of the agreement in good faith, for value and without notice of the agreement.
- (3) The interest of the transferee under a registered forest property agreement has priority over—
 - (a) the interests of the holders of encumbrances over the land—
 - (i) who consented to the registration of the agreement; or
 - (ii) whose consent was dispensed with; and
 - (b) in the case of a forest property (carbon rights) agreement—the interests of the holders of mortgages or charges over the vegetation—

- (i) who consented to the registration of the agreement; or
 - (ii) whose consent was dispensed with; and
 - (c) the interests of the holders of encumbrances over the land registered after the registration of the forest property agreement and the interests of holders of mortgages or charges over the vegetation registered after the registration of the forest property agreement; and
 - (d) the interests of all persons with unregistered interests in the land (including interests under unregistered forest property agreements).
- (4) In the case of a forest property agreement that has taken the form of an instrument of trust, the agreement, and any dealing or transaction in relation to the agreement under the provisions of this Act, may be registered under the *Real Property Act 1886* despite section 162 of that Act and, if or when registration occurs in the manner contemplated by this Act, the agreement, and any relevant dealing or transaction, will have effect in accordance with the provisions of this Act and despite any other Act or law to the contrary.

8—Dealing with interest of transferee

- (1) The transferee under a forest property agreement may, subject to the terms of the agreement, assign, mortgage or charge the interest conferred by a forest property agreement.
- (2) The following consents are required for a transaction under this section—
 - (a) if the transaction relates to the interest conferred by a forest property (vegetation) agreement—
 - (i) the owner of the land must consent to the transaction; and
 - (ii) if the ownership of carbon rights is separated from ownership of the vegetation under a forest property (carbon rights) agreement—the owner of the carbon rights must also consent; and
 - (iii) in the case of an assignment—the holder of any registered encumbrance over the land, and the holder of any registered mortgage or charge over the vegetation, must consent to the transaction; and
 - (b) if the transaction relates to the interest conferred by a forest property (carbon rights) agreement—
 - (i) the owner of the relevant vegetation must consent to the transaction and, if that person is not the owner of the land, the owner of the land must also consent; and

- (ii) in the case of an assignment—the holder of any registered encumbrance over the land, and the holder of any registered mortgage or charge over the vegetation or the carbon rights, must also consent to the transaction.
- (3) However, the Court may dispense with a consent under subsection (2) on the ground that—
 - (a) the consent has been unreasonably withheld; or
 - (b) there is some other good reason to dispense with it.
- (4) A transaction under this section is ineffective unless the consents required under this section have been obtained or dispensed with.
- (5) A transaction under this section affecting the interest conferred by a registered forest property agreement may also be registered under this Act and, unless or until registered, any interest conferred by the transaction is equitable only and therefore liable to be defeated by a purchaser who acquires an interest in the subject matter of the transaction in good faith, for value and without notice of the transaction.
- (6) If the transferee under a forest property agreement assigns its interest under the agreement, and the assignment is registered, the assignee succeeds at law to all the rights and obligations of the transferee under the agreement (and references in this Act to the transferee are to be read as references to the assignee).

9—Enforceability of registered forest property agreement by and against successors in title to the original parties

- (1) A registered forest property agreement is binding on, and enforceable by and against, the persons for the time being registered as—
 - (a) the owner of the land to which the agreement relates; and
 - (b) if the agreement transfers ownership of forest vegetation—the owner of the forest vegetation; and
 - (c) if the agreement transfers ownership of carbon rights—the owner of the carbon rights.
- (2) A person ceases to be bound by a registered forest property agreement if the person ceases to be registered as—
 - (a) the owner of the land to which the agreement relates; or
 - (b) the owner of forest vegetation; or
 - (c) the owner of carbon rights,

(but this subsection does not relieve a person from liabilities that had accrued under the agreement before the person ceased to be so registered).

10—Variation and revocation of forest property agreement

- (1) A registered forest property agreement may be varied or revoked—
 - (a) by agreement between—
 - (i) the owner of the land on which the relevant forest vegetation is situated; and
 - (ii) if the owner of the land is not the owner of the relevant forest vegetation—the owner of the forest vegetation; and
 - (iii) if the owner of the forest vegetation is not the owner of the carbon rights—the owner of the carbon rights; or
 - (b) if the forest property agreement provides for unilateral variation or revocation, or variation of revocation in some other way—in accordance with the agreement; or
 - (c) if the transferee under the forest property agreement cannot be found, or has abandoned the exercise of rights under the agreement—by order of the Court.
- (2) If, however, a forest property agreement takes the form of a declaration of trust, the agreement may only be varied or revoked—
 - (a) with the agreement of all beneficiaries of the trust; or
 - (b) as otherwise provided in the instrument of trust.
- (3) If the transferee's interest under a registered forest property agreement is subject to a registered encumbrance, the agreement cannot be varied or revoked unless—
 - (a) the holder of the encumbrance consents; or
 - (b) the Court dispenses with the consent on the ground that—
 - (i) the consent has been unreasonably withheld; or
 - (ii) there is some other good reason to dispense with it.
- (4) The variation or revocation of a registered forest property agreement does not take effect under this section unless or until the agreement, order or other instrument of variation or revocation is registered (and until registration the variation or revocation will only have an effect in equity and cannot affect the interests of a purchaser who acts in good faith, for value and without notice).
- (5) If a forest property (vegetation) agreement is revoked or terminates for some other reason, the property in vegetation to which the agreement related reverts to the owner of the land on which the vegetation is growing.

- (6) If a forest property (carbon rights) agreement is revoked or terminates for some other reason, the property in the carbon rights reverts to the owner of the relevant vegetation and ownership of the rights will then pass with ownership of the vegetation unless a further forest property (carbon rights) agreement separates ownership of the carbon rights from ownership of the vegetation.

11—Applications for registration

- (1) An application for registration of—
- (a) a forest property agreement; or
 - (b) the variation, revocation or termination of a forest property agreement; or
 - (c) a transaction affecting an interest conferred by a forest property agreement,

may be made by a party to the agreement or transaction in a form approved by the Registrar-General.

- (2) An application under subsection (1)—
- (a) must be endorsed with a certificate signed by the party applying for registration of the agreement or transaction—
 - (i) stating the name and address of every person whose consent is required under this Act for the agreement or transaction to which the application relates; and
 - (ii) certifying in relation to each of those persons that the required consent has been given in writing or that consent has been dispensed with; and
 - (b) must be endorsed with a certificate signed by a legal practitioner or registered conveyancer—
 - (i) certifying that every consent required under this Act for the agreement or transaction to which the application relates has been given or dispensed with; and
 - (ii) certifying that the application is otherwise correct for the purposes of the relevant registration law; and
 - (c) must be accompanied by—
 - (i) any survey, duplicate certificate of title, judgment, or other document the Registrar-General may require; and
 - (ii) the fee required by the regulations.

- (3) In proceedings relating to a registered forest property agreement, a court may direct the Registrar-General to make a specified variation to, or to cancel the registration of, an instrument or other document registered under this Act and the Registrar-General must, on application by a party to the proceedings, in a form approved by the Registrar-General, comply with the direction.
- (4) The Registrar-General is entitled to rely on a certificate endorsed on an application and may act on the certificate without further inquiry.

12—Application of relevant registration law

Subject to this Part, the provisions of a relevant registration law apply to, and in relation to, the registration of a forest property agreement or a transaction affecting a forest property agreement as if a forest property agreement were a profit à prendre.

13—Transitional provision for forest property agreements made before the relevant date

- (1) A forest property agreement in force under this Act immediately before the relevant date continues in force, subject to its terms and the provisions of this Act, as a forest property (vegetation) agreement with a reservation of edible fruits to the owner of the land.
- (2) The *relevant date* means the date on which *Forest Property (Carbon Rights) Amendment Act 2006* comes into operation.