



South Australian Forest Property Act Investor and Landowner Information

Private Forestry Fact Sheet Number 10

Background

The South Australian *Forest Property Act 2000*, which came into operation on 1 November 2001, aims to remove existing impediments associated with forestry development on private land by:

- providing a sound mechanism for separating land and tree ownership to facilitate forest development on private lands, including possible joint venture or similar arrangements;
- incorporating specific provisions securing carbon ownership rights in forest property;
- securing a tree owner's "right to harvest" a forest plantation.

Forestry Property Rights

Land availability is often an impediment to forestry investment and many investors enter partnerships with private landowners to gain access to suitable land. Under such arrangements, the landowner makes available all or part of their property for the growing trees and in return, the investor agrees to share in future profits according to some agreed formula.

While such arrangements can have many benefits, the lack of a sound mechanism for securing the ownership of the trees, separate to the ownership of the land on which the trees are growing has been a major impediment to the use of these arrangements.

The Act creates a specific category of agreement between land and tree owners, known as a "*forest property agreement*" which is capable of being registered as an explicit interest or covenant on the land Title. This serves to protect and preserve the tree owner's rights regardless of any change in land ownership. Similarly, landowners are not disadvantaged under such an agreement, as the ability to be able to sell or deal with their interest in the land remains.



Apart from enhanced investment security, this type of agreement also provides greater flexibility and options for both investors and landowners, especially the opportunity for land and trees to be traded independently.

Forest Property Agreement

The “***forest property agreement***” is the legal mechanism provided under the Act empowering a landowner to vest in another, the ownership of trees that are growing or proposed to be grown on their land. Apart from vesting ownership in respect of the trees, it also provides the tree owner with the right to enter the land for the purposes of planting maintaining and harvesting, including all necessary works associated with such activities.

Although the Act provides the legal framework for such arrangements, parties are **strongly encouraged to seek legal advice when considering this type of agreement**. This will help ensure that any agreement made under the *Forest Property Act 2000* takes into account the minimum requirements imposed by Section 5(2).

While only stipulating certain minimum requirements allows flexibility in the structuring of individual forest property agreements, it is also important that parties consider and seek legal advice on adequately protecting their respective rights and interests.

What matters should be dealt with in an agreement?

Although the minimum requirements imposed under *Section 5 (2)* are detailed in the extract on the next page, the following is a guide to other considerations parties may wish to include as part of the agreement: -

- Fire protection arrangements, including responsibility for establishing and maintaining firebreaks;
- Insurance and public liability;
- Any fees for use of the land or agreed profit sharing arrangements;
- Responsibility for various outgoings (local government rates and other applicable government charges);
- Vehicle access arrangements, including both general and logging vehicle access;
- Entry notification;
- Site establishment techniques;
- Fertiliser application requirements & restrictions;
- Spraying and herbicide use;
- Vermin and pest plant control;
- Soil and land conservation;
- Water use/access;
- Native vegetation protection requirements;



- Other environment protection measures;
- Grazing arrangements, if any;
- On-site facilities and permitted improvements;
- Required condition of land at the end of the agreement;

The above is not intended to be an exhaustive list of all those matters that should be considered. It is therefore important that parties obtain appropriate legal advice on these and any other matters that need to be incorporated into their respective forest property agreement.

Sections 5(2) & (3) – Forest Property Act 2000

(2) 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 specify a date on which, or circumstances in which, the agreement will terminate; and
- (f) must comply with any requirements imposed by the regulations.

(3) A forest property agreement may -

- (a) confer on the forest property owner rights to enter the land to plant, maintain and harvest forest vegetation; and
- (b) require the owner of the land, the forest property owner, or both, to take specified action for cultivation, maintenance and care of the forest vegetation; and
- (c) deal with the duty of care to be exercised by each party to the other; and
- (d) deal with any other incidental matter

How do I register a forest property agreement?

To register a forest property agreement, a party to the agreement, or duly authorised agent (legal practitioner or registered conveyancer), must make application to the Registrar-General of Lands. Application forms are available from the Registrar-General's Office and will also need to be accompanied by:-

- A copy of the signed Agreement; and
- Any survey, duplicate certificate of title, or other document that the Registrar-General requires; and



- Where the land is subject to a registered encumbrance (e.g. a mortgage) - evidence that any required consent has been obtained from the encumbrance holder or that the Court has dispensed with the consent as provided for under the *Forest Property Act 2000*; and
- The appropriate application fee.

Does the area covered by a forest property agreement need to be surveyed?

If the forest property agreement is established over a whole parcel, the agreement can be simply registered against the relevant Certificate of Title, without any additional plan or survey requirement.

Where the forest property agreement only covers a portion of the land under Title, some form of adequate identification of the actual area affected is necessary. Where separate identification is required for this purpose, the nature and accuracy of the survey or plan will be a matter for the Registrar-General to determine and advise.

The Registrar-General has indicated that any such requirements will be kept to a minimum, to avoid any unnecessary costs. Adequate identification of the land involved in the agreement is important, not only from the perspective of the Registrar-General's records, but in the interests of the parties concerned. It will also assist in avoiding future disputes and possible litigation.

What is the cost associated with registering a forest property agreement?

As at 1 November 2006, the fee for registering this type of agreement is \$104.00, while any transaction to vary an agreement, including an amendment or termination will also attract a similar fee.

Carbon Ownership Rights

The formal recognition of "carbon sinks" as a way of mitigating greenhouse emissions under various articles of the Kyoto Protocol has created significant interest in plantation forests, based on their ability to absorb and sequester carbon dioxide from the atmosphere.

This interest relates to their potential commercial value in a possible future emission trading market and expected demand from industry for a sequestration activity capable of generating "carbon credits". These "carbon credits" could then be used to offset an emitter's greenhouse gas emissions and at the same time, help Australia meet its Kyoto commitments.

While international parties to the Kyoto Protocol have made considerable progress in negotiating how forestry related activities would qualify, there is still a



high degree of uncertainty on many aspects of the Protocol, including emission trading.

Despite this uncertainty, investors are seeking mechanisms that legally establish the rights to sequestered carbon (carbon rights), as the basic framework for the creation and ownership of such rights. In recognition of this, the *Forest Property Act 2000* includes specific provisions under *Section 6(1)* which confer clear ownership rights in terms of carbon rights, in particular - “*the commercial right to exploit the carbon absorption capacity of the relevant forest vegetation*”.

Such rights are part of legally recognised interests of the forest property owner under a “forest property agreement”. The forest property owner is also able to deal with these interests pursuant to *Section 8* of the Act, including transferring these rights to another party under some contractual agreement or promise. Although these legislative provisions seek to provide investors with greater legal certainty and security in relation to such rights, the Act does not establish or guarantee carbon trading arrangements will operate. It is therefore important to understand that potential benefits from “carbon credits” are speculative at this stage and subject to considerable risk.

Parties wishing to obtain further information about growing trees for potential greenhouse opportunities should also refer to an Australian Greenhouse Office publication - *Growing trees as greenhouse sinks - an overview for landholders (September 2001)* at <http://www.greenhouse.gov.au/nrm//publications/sinks-landowners.html>.

Commercial Forest Plantation Licence (Harvest Rights)

The *Forest Property Act 2000* will also help remove another existing barrier to investment in long-term tree crops by incorporating specific “right to harvest” provisions.

The absence of secure harvesting rights can be a major issue for both prospective investors and existing plantation owners, with direct implications in terms of new forestry development and investment. This initiative aims to reduce these concerns by providing a mechanism that secures plantation harvesting rights and also remove what can be an unacceptable investment risk.

Under the *Act*, harvest security is achieved through a “*commercial forest plantation licence*”, which authorises normal forestry operations, including harvesting, and secures these rights under State law. It is also important to note that such a licence is not a compulsory requirement for all plantations, but a voluntary mechanism for plantation owners who wish to take advantage of the *Act’s* harvest security provisions.

While the “commercial forest plantation licence” will confer certain rights to the plantation owner, the licence doesn’t exclude the holder from relevant State laws



that regulate the way in which, or impose conditions on how such work is carried out. This in effect means that the licence shouldn't be construed as granting complete discretion or authority, whilst ignoring relevant State laws such as those relating to occupational health and safety, industrial noise, etc.

Can I clear native forest or vegetation under a “commercial forest plantation licence”?

The legislation only applies to **plantations** and not native forest or vegetation. Clearing (including harvesting) native vegetation on either public or private land remains subject to the *South Australian Native Vegetation Act 1991*.

Can I apply for a “commercial forest plantation licence” in respect of both existing and proposed plantations?

Under the *Forest Property Act 2000*, commercial forest plantation licences can cover both existing and proposed forest plantations. Such licences do not authorise the establishment of plantations contrary to State and Local Government planning legislation and requirements. This includes planning approval for a “change in land use” generally associated with new plantations on cleared agricultural land.

Accordingly, before establishing a forest plantation, advice should be sought from the relevant planning authority (i.e. Local Council) to ensure that any necessary approval is obtained.

Does Commonwealth legislation still apply where a “commercial forest plantation licence” covers my plantation?

While the licence confers certain rights under State legislation, it does not exclude the holder from compliance with relevant Commonwealth legislation, including the need for any possible approval under the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999*.

What is the cost of obtaining a “commercial forest plantation licence”?

There is no fee associated with obtaining a licence.

How do I apply for a commercial forest plantation licence?

Contact ForestrySA at:
ForestrySA
PO Box 162
Mount Gambier SA 5290

Telephone: (08) 8724 2888
Fax (08) 8724 2870

The following documentation will assist with any application assessment:



- Evidence that the plantation to be covered by the licence has received development approval in terms of the South Australian Development Act 1993 or alternatively, confirmation that no specific planning consent is required. Such evidence could include a copy of the local planning authority's development approval or similar formal notification.
- A map or plan of suitable scale (1:25 000 or greater) showing where the plantation is located or proposed. It should also identify the plantation area in relation to relevant property boundaries and other physical features (e.g. named public roads), where possible.
- Suitable evidence may also be required to confirm that the plantation is a bona-fide "commercial forest plantation" within the meaning of the Forest Property Act 2000. Such evidence could include, but not limited to, copies of contracts or agreements for site preparation or planting, invoices for the supply of seedlings or similar proof.

FURTHER INFORMATION

Forest Property Act 2000

A copy of the Act is available from

http://www.austlii.edu.au/au/legis/sa/consol_act/fpa2000223/index.html

Lodgement and Registration - Forest Property Agreements

Land Services Group Land Titles Registration Office

101 Grenfell Street, Adelaide SA 5000;

GPO Box 1354 Adelaide SA 5001

Phone: (08) 8226 9900

For further information contact:

PIRSA Forestry

E-mail: sim.clinton@saugov.sa.gov.au

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