**FOREST PROPERTY (CARBON RIGHTS) AMENDMENT BILL 2006**

**Legislative Assembly, 20 September 2006, pages 889-91**

Second reading

**The Hon. R.J. McEWEN (Minister for Forests)** obtained leave and introduced a bill for an act to amend the Forest Property Act 2000. Read a first time.

The Hon. R.J. McEWEN: I move: That this bill be now read a second time.

I seek leave to have the second reading explanation inserted in Hansard without my reading it. Leave granted.

I am pleased to bring before the House a Bill to amend the Forest Property Act 2000 that will enable land owners and forest owners to commercially exploit the carbon absorption capacity of forest vegetation.

The Forest Property Act 2000 for the first time identified the right to the commercial exploitation of the carbon absorption capacity of the relevant forest vegetation, and assigned that right to the forest vegetation owner.

At the time that the Forest Property Act was introduced, consideration was being given to Australia ratifying the Kyoto Protocol, and the provision identifying the right to commercial exploitation of the carbon absorption capacity of forest vegetation was included in the Act to help provide greater legal recognition of such rights in advance of a possible future emissions trading system.

Although the Commonwealth has decided not to ratify the Kyoto Protocol, and Australian emitters and forest growers are unable to participate in international Kyoto-based trading mechanisms, there is steadily building interest in carbon trading and offsets within industries and firms keen to reduce and offset their greenhouse gas emissions, and a consequent increasing interest and activity in bilateral trading of carbon rights.

These amendments to the Forest Property Act 2000 are being introduced to facilitate and encourage this growing interest in bilateral trading in carbon rights in South Australia, in advance of any emissions trading scheme that may be developed. The Bill builds on the foundations laid by the Forest Property Act 2000 by providing a robust framework for separate ownership of land, forests and carbon rights, and the protection of the rights and interests of all three parties.

The framework of separate ownership provided by the amendments for dealing in carbon rights provides an added degree of flexibility, in that it will enable landowners to sell their carbon rights while retaining ownership of the forest vegetation on their land. This will be of particular benefit to farm foresters who will be able to realise an annual income flow from their woodlot, while retaining the benefit of their longer term investment in forestry for wood production, and will encourage landholders who have previously been deterred by the long term nature of investment in farm forestry. It will also enable landholders who establish biodiversity plantings to potentially benefit from an annual income flow from the sale of carbon rights.

The Government is committed in the South Australia Strategic Plan to meet the Australian Kyoto target of 108% of 1990 emissions in the first Kyoto commitment period, 2008-2012. The Government has extended this commitment to reduce emissions by 60 per cent of 1990 levels by 2050.

The Climate Change and Greenhouse Emissions Reduction Bill 2006, released for public consultation in late June, foreshadows the establishment of voluntary greenhouse emissions offset programs. Emissions offset programs allow an individual or organisation to compensate for their greenhouse emissions, specifically carbon dioxide, through sequestration, or storage. Biosequestration, the absorption of carbon dioxide by vegetation, is a common method of sequestration.

The amendments to the Forest Property Act 2000 complement the Climate Change and Greenhouse Emissions Reduction Bill 2006 by providing a legal framework for the transfer of carbon rights from the forest owner to third party, thereby encouraging biosequestration activities that may be relevant to any future voluntary carbon offset programs established under the climate change legislation.

The identification of carbon rights in the Forest Property Act 2000 was a first step along the path of providing the legal framework to encourage biosequestration; these amendments represent the second step, by providing a robust legal framework for bilateral trading in carbon rights.

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

2—Commencement

3—Amendment provisions

These clauses are formal.

Part 2—Amendment of Forest Property Act 2000

4—Amendment of section 3—Interpretation

This clause inserts a definition of carbon right by reference to the meaning given to that term in new section 3A. It also deletes the phrase "but does not include edible fruit" in the definition of forest vegetation and deletes the definition of forest property owner from section 3 of the principal Act.

5—Insertion of section 3A This clause inserts new section 3A 3A—Carbon absorption capacity of the forest vegetation to be a form of property

Proposed section 3A establishes that the capacity of the forest vegetation to absorb carbon is a form of property, that is a carbon right, in the nature of a chose in action.

A carbon right attaches to the forest vegetation and passes with ownership of the forest vegetation unless that ownership is separated from ownership of the forest vegetation under a forest property agreement.

A forest property agreement may also relate to carbon rights in respect of the past absorption of carbon from the atmosphere as well as the absorption of carbon during the currency of the agreement.

**6—Substitution of Part 2**

This clause deletes existing Part 2 and substitutes a new part.

**Part 2—Forest property agreements**

**5—Types of forest property agreements**

New section 5 establishes that a forest property agreement may take the form of a forest property (vegetation) agreement or a forest property (carbon rights) agreement. The former agreement separates ownership of the forest vegetation from that of the land 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. A forest property (carbon rights) agreement separates ownership of carbon rights from ownership of the vegetation by transferring ownership of the carbon rights from the owner of the vegetation (the transferor) to another (the transferee). A forest property (vegetation) agreement may reserve to the transferor the right to take edible fruits from the forest vegetation.

The proposed section also provides that if ownership of the land has or is to be separated from ownership of the forest vegetation, 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.

Similarly, 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.

Proposed subsection (7) enables a forest property agreement to take the form of a declaration of trust in which a reference to the transferor is a reference to the owner as settlor and a reference to the transferee is a reference to the trustee under the trust.

**6—Form and content of forest property agreement**

New section 6(1) requires that a forest property agreement be in writing, state that it is made under the principal Act, identify the land to which it applies and describes present and future forest vegetation to which it applies to enable it to be clearly identified. If a forest property agreement is made for a specific term it must state the term of the agreement and the circumstances in which the agreement comes to an end or can be brought to an end. Furthermore, new subsection (1) states that the agreement must comply with any requirements imposed by regulation.

Proposed subsection (2) establishes that a forest property agreement may—

* 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
* 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
* deal with the duty of care to be exercised by each party to the other
* deal with incidental matters.

The making of a forest agreement under this new section requires the following consents—

* 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
* in the case of a forest property agreement conferring ownership of carbon rights—the holder of a registered encumbrance over the land and the holder of any registered mortgage or charge over the vegetation must consent to the agreement.

Proposed section 6 also provides, however, that the Court may dispense with a consent on the ground that—

* the consent has been unreasonably withheld
* or there is some other good reason to dispense with it.

The new section also states that an agreement is ineffective unless the consents required by it have either been obtained or dispensed with.

 **7—Registration of forest property agreement**

Proposed section 7(1) establishes that a forest property agreement may be registered. Proposed subsection (2) establishes that if the 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.

The proposed section establishes that the interest of the transferee under a registered forest property agreement has priority over—

* the interests of the holders of encumbrances over the land who consented to the registration of the agreement or whose consent was dispensed with and, in the case of a forest property (carbon rights) agreement, the interests of the holders of mortgages or charges over the vegetation who consented to the registration of the agreement or whose consent was dispensed with
* 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
* the interests of all persons with unregistered interests in the land—including interests under unregistered forest property agreements

Proposed subsection (4) outlines the necessary process for registering an agreement in the form of a declaration of trust under the Real Property Act 1886 despite the operation of section 162 of that Act.

**8—Dealing with interest of transferee**

Subject to the terms of the agreement, proposed section 8 enables a transferee under a forest property agreement to assign, mortgage or charge the interest conferred by a forest property agreement.

If the transaction under this proposed section relates to the interest conferred by a forest property (vegetation) agreement, proposed subsection (2) requires the following consents for a transaction under new section 8—

* the owner of the land must consent to the transaction
* 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
* 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.

If the transaction under the new section relates to the interest conferred by a forest property (carbon rights) agreement, proposed subsection (2) requires the following consents for a transaction under new section 8—

* 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
* 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.

The Court may dispense with a consent under proposed subsection (2) on the ground that—

* the consent has been unreasonably withheld
* there is some other good reason to dispense with it.

A transaction under this new section is ineffective unless the required consents have been obtained or dispensed with.

A transaction under proposed section 8 affecting the interest conferred by a registered forest property agreement may 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.

New subsection (6) provides that 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**

Proposed section 9 provides that a registered forest property agreement is binding on, and enforceable by and against, the persons for the time being registered as—

* the owner of the land to which the agreement relates
* if the agreement transfers ownership of forest vegetation—the owner of the forest vegetation
* if the agreement transfers ownership of carbon rights—the owner of the carbon rights.

New subsection (2) ensures that a registered forest property agreement is no longer binding if the person ceases to be registered as—

* the owner of the land to which the agreement relates
* the owner of forest vegetation
* the owner of carbon rights.

However, this 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**

New section 10(1) provides for the variation and revocation of a forest property agreement by agreement between—

* the owner of the land on which the relevant forest vegetation is situated
* if the owner of the land is not the owner of the relevant forest vegetation—the owner of the forest vegetation
* if the owner of the forest vegetation is not the owner of the carbon rights—the owner of the carbon rights or
* 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 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.

Proposed subsection (2) provides for the variation or revocation of a forest property agreement if a forest property agreement takes the form of a declaration of trust but only with the agreement of all beneficiaries of the trust or as otherwise provided in the instrument of trust.

New subsection (3) provides that 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—

* the holder of the encumbrance consents or
* the Court dispenses with the consent on the ground that the consent has been unreasonably withheld or there is some other good reason to dispense with it.

New subsection (4) states that the variation or revocation of a registered forest property agreement does not take effect under proposed section 10 unless or until the agreement, order or other instrument of variation or revocation is registered. Until the agreement is registered the variation or revocation will only have effect in equity and cannot affect the interests of a purchaser who acts in good faith, for value and without notice.)

Proposed subsection (5) makes it clear that 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.

Proposed subsection (6) states that 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**

New section 11 enables an application for registration to be made by a party to the agreement or transaction in a form approved by the Registrar-General for the following—

* a forest property agreement
* the variation, revocation or termination of a forest property agreement
* a transaction affecting an interest conferred by a forest property agreement.

An application under new section 11 must be endorsed with a certificate signed by the parties to the agreement or transaction—

* stating the name and address of every person whose consent is required under the principal Act for the agreement or transaction to which the application relates
* certifying in relation to each of those persons that the required consent has been given in writing or that consent has been dispensed with.

An application must also be endorsed with a certificate signed by a legal practitioner or registered conveyancer—

* certifying that every consent required under the principal Act for the agreement or transaction to which the application relates has been given or dispensed with
* certifying that the application is otherwise correct for the purposes of the relevant registration law.

An application must also be accompanied by—

* any survey, duplicate certificate of title, judgment, or other document the Registrar-General may require
* the fee required by the regulations.

Proposed subsection (3) provides that 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 the principal 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.

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**

New section 12 establishes that subject to Part 2 of the principal Act, 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 àprendre.

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

New section 13 operates as a transitional provision to provide that a forest property agreement in force under the principal Act immediately before the commencement of the Forest Property (Carbon Rights) Amendment Act 2006 continues in force, subject to its terms and the provisions of the principal Act, as a forest property (vegetation) agreement with a reservation of edible fruits to the owner of the land.

The Hon. R.G. KERIN secured the adjournment of the debate.