



# TRUST *for* NATURE

# INFORMATION SHEET

## LEGAL ISSUES FOR PARTICIPANTS IN ENVIRONMENTAL MARKETS

WHAT LEGAL ISSUES TO LOOK OUT FOR WHEN YOU ARE THINKING OF PARTICIPATING IN A LAND-BASED ENVIRONMENTAL MARKET OR INCENTIVE SCHEME AIMED AT PRIVATE LAND CONSERVATION

*This information sheet aims to assist private landowners who are already managing their land for conservation purposes as well as those wishing to enter into environmental market schemes and arrangements with general guidance about the legal issues you should consider. It is not intended as legal advice or an alternative to obtaining independent legal or taxation advice but may assist in guiding decisions and identifying what advice you may need.*

### There are many environmental market schemes or payment opportunities

There are a variety of market-based schemes and opportunities aimed at protecting and enhancing environmental values on private land. For example, one of the values is biodiversity, for which opportunities include protecting threatened species, improving wetland and riparian zones, and sequestering carbon in native forests.

Some market-based arrangements can be used to generate 'credits' which can then be sold to others seeking to offset environmental impacts elsewhere. Market systems are also used to deliver government and private funds for conservation activities, by for example making annual payments to a landowner in return for specific land management actions such as construction of fencing, stock exclusion, or revegetation over a specified number of years. Other examples include public investors scientifically identifying and targeting high-conservation value land for permanent on-title protection, leading to an offer to pay a landowner a per hectare price for that protection.

Examples of the diversity of environmental market schemes include environmental offsets under the Australian Government's *Environment Protection and Biodiversity Act 1999*, which may be targeted at protection or improvement of particular threatened species and their habitat. The Australian Government's Carbon Farming Initiative is another market scheme, aiming to facilitate the sequestration of carbon in plants and soil (as well as avoiding emissions), and targeted to particular activities such as protection and

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enhancement of native forests. The Victorian Government's schemes such as BushTender are more generally focused on biodiversity in particular geographic areas. Catchment Management Authorities throughout Victoria also deliver market-based private land conservation projects, either directly through their own staff or in partnership with organisations such as Trust for Nature and Greening Australia.

## What laws and regulations might you need to comply with?

Participating in an environmental market scheme may involve you in a range of legal obligations under contract, under on-title agreements, or under both. In addition, there will be other legal obligations relevant to managing your land which may affect the way in which you participate in any scheme. For example, planning controls and zoning. Another example is ecosystem service contracts requiring active control and management of pest species control for which you may need licences or permits to handle poisons or firearms, and/or you may need to notify neighbours. It's a good idea to familiarise yourself with these general legal requirements as any environmental market contract you intend to enter into will usually require you to warrant that you will comply with these laws.

The Department of Environment and Primary Industries in Victoria provides good accessible information about landowners' general legal obligations.

## What can you expect from the organisations you will be dealing with?

If you are entering into an agreement with a public authority such as the Department of Environment and Primary Industries (for example, under the **Conservation, Forests and Lands Act 1987**) or a statutory body such as Trust for Nature (established under the **Victorian Conservation Trust Act 1972**), information will be provided to you about its role and its powers to enter into agreements with you.

## What should you look for in an environmental market or incentive contract?

As a landowner entering into an agreement you will most probably not be the one writing the contract. Contracts will typically be prepared by the 'purchaser' or funding body such as a Catchment Management Authority, or an intermediary such as an 'offset broker'. In some cases it may be a form of contract required by law, such as a Carbon Farming Initiative sale of carbon credits, or by the authority responsible for enforcing environmental protection, such as native vegetation clearing regulations.

The contract is the key document binding you and the purchaser/funder (or other parties) and it will contain the key obligations, as well as rights, remedies and power to do or require things. The contract may also refer to other legislation and regulations that you need to also comply with.

Considering the legal issues involved in the contract and its implications for your future management of your land, and overall personal and business circumstances, is important even if it is for a relatively small amount of money. Although not an exhaustive list, some important issues for you and perhaps an advisor to consider are as follows.

### The management program

This will contain the schedule of actions and/or outcomes you are agreeing to undertake or deliver over the course of the contract. These actions are often a principal focus of attention and negotiation between landowners and purchasers/funders (and also experts, such as ecological assessors). It is important to consider what you are agreeing to deliver and that this is clearly and accurately represented. In addition it is important to ensure that underpinning facts and statements are accurate, such as the description of the land, registered owners and any existing encumbrances, and description of the vegetation and any threatened species you are committing to protect. Getting these details right could help avoid headaches later.

## Timing and schedule of payments

This can be an important issue if you are concerned about when you are going to get paid and in what manner. It may have tax implications if, for example, you receive multiple payments in the same financial year.

## Requirements to enter into ‘on-title’ obligations attached to the land

‘On-title’ obligations are attachment of rights, obligations or restrictions to a land parcel and if you sell the land, the new owner will have to comply with these. They may be in the form of covenants (for example, a Trust for Nature conservation covenant) or a statutory agreement (for example, an agreement under section 173 of the *Planning and Environment Act 1987*, or a land management cooperative agreement under section 69 of the *Conservation, Forests and Lands Act 1987*). In the case of Carbon Farming Initiative (CFI) and carbon sequestration interests created outside the CFI regime, these will ordinarily be secured through a Forestry and Carbon Management Agreement under the Victorian *Climate Change Act 2010*.

The timeframes and implications of different type of legal instruments are not necessarily the same. The organisation responsible for each agreement, including agreements spanning up to 5, 10, and 15 years, as well as permanent conservation agreements registered on-title, should be able to provide detailed information for you on the implications of entering into such an agreement.

## Indemnities

If there are losses or costs associated with problems delivering actions under the contract, there may be indemnity clauses in the agreement designed to allocate who is responsible for covering losses or costs. Consider these carefully and in particular what liabilities you may have to bear if problems arise.

## Variation and termination of the agreement

If circumstances change significantly, for ecological or other reasons, it may be necessary to change the agreement, so you should check whether there are provisions to vary it. Often this will be included and subject to the consent of both parties. There are circumstances in which you or the purchaser/funding party may need or wish to terminate the agreement. You should check carefully what the notice provisions are if this situation arose and what rights you would have to do so or obligations the other party has, such as payment of outstanding monies or performance of incomplete obligations.

## Default

What happens if you can’t achieve part of the management program, or in a way stipulated in the agreement? Check if a ‘default’ clause has been written into the agreement. It should specify what a default is (‘events of default’) and what happens if there is a default. It is important that there are provisions for parties to notify others if this happens and whether this kind of problem can be sorted out without ending the contract (how to ‘remedy’ default).

## Force majeure

This imposing term (literally, ‘superior force’) refers to events fundamentally changing the situation of a party, which are beyond their control and render their capacity to meet obligations impossible in whole or part, for a period of time or permanently. In environmental management programs, this could mean major flood or fire events, or unanticipated invasive species incursion.

The important factor in ecological contracts is, firstly, whether a *force majeure* clause has been written into the agreement, and, subsequently, how the clause has been drafted, including what specific events are covered by this contingency, what procedures govern its use, and what the consequences are of doing so.

## Disputes and grievances resolution

Clear, accessible, inexpensive and proportionate means of resolving problems are a key feature of well-designed contracts. Landowners and ‘purchaser’/funders engaged in environmental market schemes encountering problems or disputes are predominantly able to settle any issues between them by informal means. If a contract you are presented with does not provide for alternate dispute and grievance

resolution options, you may wish to ask about how disputes and grievances will be approached and whether explicit provision could be made for informal resolution mechanisms in the first instance.

Alternative dispute resolution, such as mediation or arbitration, can be useful but it may also be important that there are provisions that distinguish between disputes of an administrative nature and those dealing with ecological issues. The latter may require independent expert review or evaluation of claims. Contractual provisions – that is, more formal processes for more serious or protracted issues – may be important for you, particularly if the contract involves a large sum of money; extends over a number of years and/or has technically difficult management activities required of you, such as wetland restoration. This could help avoid or minimise difficulties if issues arise in the future.

## Can you provide ‘additional’ environmental gains?

Most environmental market and ecosystem services payment schemes will include rules to ensure that landowners provide environmental benefits – or ‘gains’ – above and beyond what you are already doing, beyond what is common practices and beyond what you are required to do by law or because of agreements you are already party to. This principle is called ‘additionality.’

When providing ‘additional’ environmental gains through land management it is important to consider what the ‘baseline’ or starting point is. Environmental assessments or similar studies will be useful in determining this.

If you already have or have committed to put in place on-title permanent protection of environmental values on the land, whether or not in return for a material benefit or payment, this may or may not prevent you participating in other payment schemes. There can be exceptions to this but it is worth assessing your present obligations carefully to consider what additional environmental benefits you can bring.

A separate more detailed information sheet on ‘additionality’ rules affecting environmental markets and incentive payments can be accessed from the Trust for Nature website.

## What else should you consider before providing services?

### Arriving at a price

Usually, there is scope for negotiation on price and what management actions need to be undertaken to meet the goals and objectives of the agreement before formally signing it. You should very carefully consider what it would cost to meet your obligations and how much the ‘ecosystem services’ you are providing are worth. Ability to vary terms under an environmental market or incentive contract will usually be quite constrained and not include price variation arrangements.

### Land management expert assistance during the term of the contract

Rights to expert assistance or services in meeting your obligations should be considered when pricing your ecosystem services. Expert land management advice may or may not be provided to you as part of the arrangement and you may wish to take the need to pay for them yourself into account in your pricing considerations.

### Tax implications – income tax, ‘landcare operations’ and land tax

There are likely to be income tax implications for entering into environmental market and incentive schemes, as well as potential implications under land tax and municipal rates obligations.

Income tax implications may depend on whether payments received are considered to be income for tax purposes and what type of legal entity is being used to enter into the contract, such as you as an individual alone or in partnership, or as a company or trust.

There are specific Income Tax Assessment Act provisions relating to carbon sink forests and CFI projects.

The Australian Tax Office (ATO) website has very clear and comprehensive information about tax treatment of conservation covenanting and 'landcare operations'.

A separate more detailed information sheet on 'Taxation' administrative rules and laws affecting environmental markets and incentive payments can be accessed from the Trust for Nature website.

Some councils will provide rate rebates for property with permanent protection or conservation covenants attached to them, although this has not been universally adopted across Victoria. Depending on whether or not you have the status of a primary producer as defined by the Victorian *Land Tax Act 2005* and the value of your land, there may also be land tax implications for you as a result of entering into a permanent on-title protection agreement.

Check the Trust for Nature website for further information about land-based taxation as it is a changing area of the law.

## Social security implications

Given that payments may be considered as income, the rate at which you receive social security payments may also be affected. This may, for example, affect rates of payment of benefits or pensions. Generally, if you keep records of income received as a result of your participation in a scheme and expenditure incurred as a result, and this demonstrates an overall loss for which the payments partially reimburse you, any possible complications will be minimised. Discussions where relevant with Commonwealth Centrelink, Human Services and Veterans Affairs Offices may clarify the most desirable approach given your circumstances.

## Wills and estate planning

Wills and estate planning are another one of the areas you may need to consider. For instance, if you are placing forms of permanent conservation protection over your land, this may affect what beneficiaries may do with the land if you are passing it on to them and discussions with proposed beneficiaries may be useful.

## Useful Resources

DEPI *Native vegetation permitted clearing regulations*, <http://www.depi.vic.gov.au/environment-and-wildlife/biodiversity/native-vegetation/native-vegetation-permitted-clearing-regulations>

DEPI *Ecomarkets: Ecotender and Bushtender*, [http://www.depi.vic.gov.au/\\_data/assets/pdf\\_file/0014/204422/Tender\\_based\\_ecoMarkets\\_Information\\_Sheets.pdf](http://www.depi.vic.gov.au/_data/assets/pdf_file/0014/204422/Tender_based_ecoMarkets_Information_Sheets.pdf)

Norton Rose Fulbright *CFI Legal and Contracts Guide* (2013), <http://www.nortonrosefulbright.com/files/cfi-legal-and-contracts-guide-111633.pdf>

Trust for Nature information sheets *Additionality in environmental markets* and *Taxation, private land conservation and participation in land-based environmental market schemes* <http://www.trustfornature.org.au>

Trust for Nature *Land-based environmental markets and the law: The evolving legal landscape underpinning ecosystem services markets in Victoria* (2014), <http://www.trustfornature.org.au/data/media/00002011/Web2-Land-based-environmental-markets-and-the-law.pdf>

Trust for Nature *Shining a Light on law and markets in private land conservation: insights and issues from Victorian landowners* (2014), <http://www.trustfornature.org.au/data/media/00002093/Shining-a-light.pdf>

Australian Taxation Office <https://www.ato.gov.au/Business/Primary-producers/In-detail/Landcare-and-water/Landcare-operations/>