

TRUST *for* NATURE

# SHINING A LIGHT ON LAW AND MARKETS IN PRIVATE LAND CONSERVATION

INSIGHTS AND ISSUES FROM VICTORIAN LANDOWNERS



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Cover image: Dockers Plains Pastoral Co. landscape-scale conservation covenant in north-east Victoria; photo: Trust for Nature.

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# Executive summary

## Introduction

This report is the second of two prepared by Trust for Nature, in conjunction with the Victoria Naturally Alliance, to consider the legal dimensions of market arrangements to deliver environmental management and restoration outcomes on private land. We are very appreciative of the Victorian Legal Services Board's generous support of our work in this important emerging area of the law, particularly impacting on rural and regional landowners.

The focus of this report is qualitative research undertaken with landowners, examining the legal issues and themes identified in the first report of this project, *Land-based environmental markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria*.

The results of face-to-face, semi-structured interviews with 17 land managers, and consultations with some natural resource management professionals supporting landowners entering environmental market transactions, have provided a base of information, insights and experiences that has enabled this report to provide:

- a detailed consideration of key aspects of the legal issues involved from a practice, administration, and policy perspective;
- a perspective on the utility of current information about the legal implications (including taxation) for a landowner in entering into an environmental market scheme; and
- an identification of areas for possible improvements to be made to land-based environmental market operations from the perspective of a private landowner and the law.

Landowners interviewed through Trust for Nature and Victoria Naturally Alliance networks. For the purposes of this report we refer to this group of interviewees as land managers. Four of 17 were engaged in agribusiness. An additional two land managers operate environmental market businesses. Eight land managers relied on mixed income sources. Two represented not-for-profit entities and one represented a public sector entity. Taking the demographics of the land managers interviewed into account, the interview results do not claim fully to represent a 'private landowner perspective'. Rather, they provide a particular sample of the views of landowners with environmental market experience, to shine a light on how the law and emerging land-based environmental markets interact.

## What the Report covers

This Report's five chapters cover:

1. an introduction to environmental markets, interviews and research undertaken;
2. landowner motivations and experiences of environmental markets;
3. contracts and land management agreements from a landowner perspective;
4. regulatory, taxation and other legal considerations for landowners; and
5. conclusions about next stages of evolution and potential improvements.

A glossary of specialist terms used is also provided at the end of this report.

This Report summarises key interview and research results as well as makes recommendations when considered appropriate. Recommendations made are listed at the end of this summary. Some key interview and research results are as follows.

Support important to land managers included:

- local staff and agencies, rather than relationships with central agencies; and
- informal and formal networks including 'communities of practice'.

On the other hand, support to land managers did not include accessible information about the legal implications, including taxation treatment of the environmental market transactions they had entered into.

Environmental market transactions were often demonstrated to occur within a 'quasi-commercial' environment. Flexibility and exercise of discretion are important in the delivery of environmental market programs to allow for circumstances beyond landowners' control arising over an extended contractual period, including climate variability and the realities of ecological processes. In summary, ecosystem services contracts are characterised by a synthesis of legal forms, ecological realities and substance, and commercial practices.

Contracts examined varied in inclusions and there were gaps in land managers' understanding of important provisions and processes. Our conclusions include:

- access to land with notice and self-reporting provisions are standard. Facilitative and interactive approaches to assessment, monitoring and reporting would be preferred by landowners over compliance-based approaches;
- default and remedy provisions are not necessarily universal in agreements or understood in depth by landowners;
- indemnity provisions appear to be standard, although interviewees were generally unaware of their existence or implications of the terms of the agreements they had signed;
- express terms relating to the exercise of assessments or of other professional competence and judgement could usefully be written in, as mistakes have occurred in environmental market transactions; and

- availability of appropriately drafted disputes- (and/or grievance-) handling mechanisms are a significant gap in contract and policy design.

Adaptive management approaches appear to be an appropriate context of contractual variation, but could benefit from explicit provisions allowing such approaches within contracts.

Additionality requirements are important and supported in general, but conflicts and tension can operate between regulatory additionality rules and permanent, on-title environmental obligations. Different strategies may need to be considered to address this, such as alternative rules that recognise the public benefit derived from already permanently protected land or, appropriate modifications to the drafting of conservation covenants.

Tax treatment of environmental market payments did represent a significant concern for some interviewees. Further professional development or guidance of tax advisers (both accountants and lawyers) on the nature and implications of environmental market schemes would be desirable. Further engagement with financial institutions and mortgage-providers may be warranted, especially in rural and regional areas, and the professional development of their officers in environmental market opportunities for landowners.

The research raised a number of issues with implications for income tax law and policy, including:

- tax treatment is complex and may be difficult for landowners to navigate and may lack coherence;
- information about possible tax treatment is not readily accessible to environmental market participants; and
- tax treatment of 'ecosystem services' merits standalone architecture.

## Conclusions and recommendations

Development of a Victorian and, potentially, a national approach to guide the use, content and development of environmental market mechanisms could help the process of learning from good practice, avoiding pitfalls and creating common frameworks for these dealings.

The development of model contracts and contract clauses could also be useful, as could development of policies, protocols or technical guidance common to the ecosystem services contract.

Taking into account the long-term nature of many environmental market and incentive scheme contracts, a number of specific recommendations are made about dealings with landowners before contracts are agreed, as well as during the term of a contract, terms and contractual mechanisms. The underlying principles behind many of the recommendations in this regard are fairness, equity and transparency.

In addition, considering a private landowner perspective, the Report offers recommendations for potential administrative, legal, program and practical improvements that could improve the operation of land-based environmental market transactions. We believe these improvements could provide longer-term confidence, fairness and transparency in transactions for private landowners at the same time as deliver greater efficiency and certainty for financiers of transactions. Recommendations can be found throughout the report and are summarised here.

### Recommendation 1

The following areas for potential administrative improvements could be considered by environmental market scheme designers and administrators:

- increase flexibility in relation to contracts and management plan activities;
- reduce legal and practical complexities arising for landowners from the fragmentation of environmental market schemes and policy frameworks between jurisdictions and purchasers;
- improve how transactional mistakes and technical errors are handled;
- address the risks of landowners' disenchantment with:
  - o scheme administrator inertia or bureaucratic responses, and
  - o lack of general advice about legal implications, for example, in regards to tax;
- create appropriate and efficient complaints- or dispute-handling mechanisms.

### Recommendation 2

Development of 'social learning' practices and methods could be considered as important to the further development and future success of environmental market approaches. As seen in other land management programs such as Landcare, communities of practice and engagement, or 'social learning' processes, are important to technical knowledge of environmental market schemes, environmental management and restoration practices.

### Recommendation 3

Because ecosystem services contracts typically involve long-term relationships, consideration could be given in the contract to the need to accommodate dealing with unforeseen or changed circumstances, to providing scope for renegotiation in appropriate circumstances, and for astute and timely management of problems and disputes.

### Recommendation 4

The design and policies guiding the operation of environmental markets and mechanisms could be further considered in relation to 'take-it-or-leave-it' standard form contract transactions to ensure landowners have appropriate protections and standards of procedural and substantive fairness.

### Recommendation 5

Consideration could be given to variable levels of targeted landowner skill and ability in pricing land management activities. If the market opportunity involves reverse auction/tender bid preparation. For example, by large 'purchasers' offering preparatory training and guidance on

bid preparation and pricing to ensure common base levels of knowledge. Tender preparation approaches in other sectors (for example, agribusiness) could be investigated for alternate models, particularly in relation to price guidance.

#### Recommendation 6

Facilitative and interactive approaches to assessment, monitoring and reporting would, where possible, be preferred by landowners over compliance-based approaches, reflecting contractual terms over several years and a priority to building constructive relationships for the longer term consistent with a proportionate and risk-based approach to contract management.

#### Recommendation 7

Clear provisions for party default and remedy could be drafted into agreements and their content, role and functions could be explained to landowners before contracts are entered into.

#### Recommendation 8

Force majeure provisions could be written into agreements and their nature, content and purpose could be explained to participating landowners. Preparation of model clauses could be useful, contemplating supervening events likely to affect ecosystem services contracts and appropriate procedural steps and outcomes.

#### Recommendation 9

That consideration be given to clearly drafting an indemnity requirement of a landowner entering into environmental market contracts together with plain English explanations being provided about what it covers. Further that landowner indemnification of purchaser/financier parties for costs associated with default, remedy or dispute resolution, including legal costs, could be limited to reasonable costs and reflect the intended conduct and approaches of the parties to risks and particularly the uncertainties of managing ecological processes.

#### Recommendation 10

Contractual procedures for review of assessments or decisions where mistakes are claimed would appear to be appropriate and necessary. Consideration could be given to express provisions in contracts for actions by 'purchasing' parties and/or their agents to be carried out with due skill and care.

#### Recommendation 11

Adaptive management approaches and principles accepted as best practice by natural resource management specialists could be considered for specific integration into environmental market program design.

### Recommendation 12

Further consideration could be given to development of disputes and complaints handling mechanisms in ecosystem service contracts, along with the development of supporting policies and program design.

### Recommendation 13

Development of procedures, standards, guidance and protocols for ‘bundling’ or ‘stacking’ payments could be considered.

### Recommendation 14

Further professional development or guidance of tax advisers on the nature and implications of environmental market schemes could be desirable. ATO tax treatment information relevant to land managers undertaking land care and conservation activities on private land could be simplified; made a lot more informative and accessible to support landowners decision-making about participation in environmental incentive and market based schemes.

### Recommendation 15

Engagement with financial institutions and mortgage-providers may be warranted, especially in rural and regional areas, and the professional development of their officers in environmental market opportunities for landowners.

### Recommendation 16

That Federal and State natural resource management policy decision-makers engage with the public, not-for-profit and private sectors with an interest in private land conservation market mechanisms, to explore potential benefits from arriving at a set of *Best practice principles and approaches to the law, environmental market and incentive schemes* to assist with governing environmental markets and conservation finance. Further, to assist with this process the accompanying Draft Best Practice Principles and Approaches be considered.

#### *Scheme transparency and objectives*

- Fair and efficient operation of environmental market schemes operating within a legislative framework would both support their operation and protect landowners’ interests in a manner that is proportionate to scale, purposes and interests affected.
- Environmental market schemes with clearly established objectives, goals and purposes made available to private landowners and their advisors demonstrate market and incentive schemes transparency.
- Schemes require clear disclosure of the key legal implications of proposed contractual obligations to prospective participants taking into account the particular nature of the ecosystem services market opportunity.

- Remuneration and prices that are publicly transparent help build confidence in potential scheme participants as would guidance and/or a model for pricing bids when schemes are based on competitive and confidential pricing mechanisms.
- Environmental market schemes should as far as practicable complement rather than undermine cooperative and collaborative land conservation practices across landscapes.

#### *Additionality and integration of schemes*

- Clear and transparent public policy statements about additionality rules and frameworks made available to landholders and practitioners, taking into account the functioning of environmental market schemes and funding opportunities across jurisdictions, will build greater confidence levels in market-based incentive schemes.
- Environmental market and incentive schemes that allow for inter-operability with complementary schemes and programs can facilitate landowners' confidence in managing land for conservation and help leverage multisector investments in private land conservation.

#### *Fairness in contractual terms and dealings*

- Contracts for the delivery of ecosystem services can be characterised as 'relational', 'long-term' contracts, involving both ecological and public interest subject-matter. Contract design taking these characteristics into account, would for instance, focus on how contracts therefore deal with risk and uncertainties; non-performance or disputes resolution; and choice of monitoring, stewardship and compliance frameworks.
- Potential and likely imbalances in transactional power before, at the time of contract establishment and during a contract term, need to be anticipated. Measures to avoid and/or deal with procedural or substantive unfairness should be developed.
- As far as practicable, financing and contractual arrangements for environmental market schemes should accommodate flexibility for landowners and include facility for payments to take account of the social security, taxation and/or commercial considerations of landowners.
- Tax treatment of payments for ecosystem services, including information about tax treatment, should be simplified and made readily accessible for the private landowner.
- Participants in environmental market schemes should be given clear, independent and easily accessible means of recourse in circumstances of dispute or grievance.

#### *Balancing environmental scheme integrity and scheme efficiency*

- Achievement of outcomes intended from an environmental market or incentive scheme should balance consideration of unintended consequences, such as deterring landholder participation, that arise from complexities, inefficiencies and delays in dealings.

#### *Continuous improvement*

- As far as practicable improvements and the future evolution of environmental market and incentive scheme approaches, policies, tools and models (including contracts) should be informed by private landowner perspectives.

### Recommendation 17

Consideration of alternate legal arrangements adopted internationally, such as the US Wetland Mitigation Fee In Lieu model facilitating multiple landowner engagement with an environmental market and incentive schemes could improve landscape-scale outcomes.

### Recommendation 18

That land management public policy decision-makers consider the potential benefits of providing accessible and transparent valuations and pricing guidance, as well as the benefits and trade-offs of competitive bidding as against fixed pricing funding models.

### Recommendation 19

Reviewing the purposes and contemporary usefulness of the 'landcare operations' concessions under the Income Tax Assessment Act 1997 could result in increasing private investment in sustainable land management practices to the benefit of Australia and public sector environmental sustainability programs.

### Recommendation 20

ATO consideration of stand-alone treatment of revenues from the management of 'ecosystem services' as a category of economic activity could support the overall governance of environmental markets and enhance public sector funding programs' ability to leverage private investment in conservation.

### Recommendation 21

Canadian (and American) approaches to the tax treatment of ecosystem services payments that seek to clarify and distinguish private and public interest dimensions to revenues, as well as allowing for ecological 'gifting', could substantially benefit Australia's ecosystem service protection efforts, and enable a greater level of transparency, fairness and landowner confidence in environmental contracts.



Protected property in Victoria's Goulburn Broken catchment area; photo: D. Donald, Trust for Nature.

## Part 1 Introduction

The use of market-type mechanisms to organise and deliver environmental and conservation outcomes in Australia has become a significant policy instrument over the past ten to fifteen years. Arrangements such as conservation tenders, or ‘reverse auction’, schemes, payments for permanent on title protection of high value habitat at a fixed or negotiated price per hectare and the ‘purchase’ of remedial or compensatory responses to damaging environmental conduct in the form of environmental ‘offsets’, are the more prominent circumstances in which market dynamics have entered into conservation programs. Both public and private sources of finance underpin these arrangements. Australia has been a leader internationally in the development of these types of market mechanisms, but similar schemes have increasingly proliferated around the world,<sup>1</sup> often as a variation of so-called ‘payment for ecosystem services’ programs.

Legal and policy frameworks and institutions are also central to this emerging field of practice and thinking.

As new areas of human endeavour emerge, so do new areas of legal practice. Each year sees the legal profession adapting to changes in society by promoting new and emerging areas of legal practice.

Recognition of private land conservation as an accepted area of public policy is a recent phenomenon. There is also a growing understanding that private land has a central role in achieving national environmental outcomes. People are using, and financing, private land conservation in unprecedented ways. In this context we would expect to see an emerging area of law and this was the subject matter of Land-based environment markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria,<sup>2</sup> (Report 1).

New areas of legal practice are not, however, static. They are adaptive in that they usually evolve and mature in response to the growing experience and knowledge of those involved. Trends and patterns emerge over time and changes and refinements are made to both law and practice. This second report aims to assist in the refinement and evolution of the law concerning eco markets. It does this by providing an indicative snapshot of how people are using and thinking about the law in practice. It provides a sense of emerging legal issues created by the interplay of conservation practice and existing legal frameworks. Finally, in this context it proposes the next stages for refinements in the law and its usage so as to better support landowners involved in conservation and conservation itself.

The experiences and insights of landowners in the operation and practice of market arrangements obviously represent important sources of information and knowledge in evaluating and analysing how they work in practice. Landowners are key constituencies – or in legal parlance, parties – in the functioning of markets for conservation outcomes, whether, for instance, as ‘price takers’ for a fixed price on offer for permanent protection of land or bidders and recipients of tender funds or as ‘suppliers’ of compensatory environmental management and restoration on the land they manage. Indeed, the experience and insights of landowners is not merely significant for the acquisition of data regarding market operation or performance but may be an important source of conceptual thought, analysis and ideas about how these market schemes work and how to appraise them.

This report is the second of two monographs prepared and written by Trust for Nature, in partnership with the Victoria Naturally Alliance, on the legal aspects of market arrangements in the delivery of private

land conservation. Report 1,<sup>3</sup> provides a broad-based study and analysis of the various forms of market mechanism emerging for the provision of environmentally beneficial outcomes. The focus of that report was primarily on schemes delivering biodiversity conservation and carbon mitigation outcomes, such as through tender schemes, offset arrangements, purchasing of voluntary permanent protection of land, and carbon sequestration (or emissions avoidance) mechanisms. In addition to providing an outline of market arrangements in the Victorian and Australian Commonwealth context, this first Report outlined a number of legal and regulatory issues appearing to be common to these schemes. These issues included the regulatory bases of schemes, the general application of contract and property law, and consideration of incidental legal issues such as tax law, social security law and estate planning. A number of draft 'best practice' principles were also identified for later testing in interviews with landowners and natural resource management specialists knowledgeable in environmental market schemes. These schemes included public sector programs supporting the purchase of voluntary protection of conservation assets on land, Victoria's BushTender, the Australian Government's Caring for Our Country Environmental Stewardship Program, and the Carbon Farming Initiative.

The themes and principles considered and elaborated in the first Report provided the basis of research and investigation for this second Report. Using those insights and ideas as a starting point, the focus of this Report is to incorporate social research with landowners and consultation with a number of natural resource management specialists into analysis and review of market schemes.

The purpose of this Report is to take those insights and ideas and consider how environmental markets are best understood and what useful proposals may be made to improve those market mechanisms and their implementation.

This Report's five chapters cover:

1. an introduction to environmental markets, interviews and research undertaken;
2. landowner motivations and experiences of environmental markets;
3. contracts and land management agreements from a landowner perspective;
4. regulatory, taxation and other legal considerations for landowners; and
5. conclusions about the next stages of evolution and potential improvements.

For the purposes of consistency, the various schemes referred to in this Report and in the first Report are considered as the bases of 'environmental markets'. As noted in the first Report, these markets or market mechanisms are typically the product of a particular regulatory context, such as Victorian planning regulations and the national *Environment Protection and Biodiversity Conservation Act 1999*. They are the product of express regulatory intervention and arrangements intended to both achieve environmental (conservation) outcomes and foster economic models of dealings and relationships, that is to say transactional arrangements with some commercial element. These characteristics of 'the environmental market' and of commercial dynamics are considered further below.

Trust for Nature and Victoria Naturally Alliance are very grateful to have received a grant from the Legal Services Board Grants program to undertake work in this important emerging area of the law.

## 1.1 The emergence of environmental markets

Environmental markets are a relatively recent phenomenon. In Australia, competitive tender schemes began to be rolled out in the 2000s and offsets markets emerged in the same decade. Environmental markets seek to integrate private land conservation and management objectives into the overall economy within which farmers and landowners operate. Legal and policy frameworks and institutions are also central to this emerging field of practice and thinking, such as contracts, property rights, taxation and public administration. As our first Report, *Land-based environmental markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria*, sought to emphasise, environmental markets cannot be conceived without the practical and regulatory bases of law, whether this basis comprises the complex regulatory frameworks of the Carbon Farming Initiative, or the ordinary legal foundations of enforceable contracts and dealings in property. International frameworks and principles are now emerging on how environmental market systems and ‘payments for ecosystem services’ should work.<sup>4</sup>

The increasing use of environmental markets and mechanisms to achieve environmental management objectives is deserving of its own specialist attention given the diversity of practices, laws, conduct, rules and policy, built around key transactions and contractual relationships.

Landowners’ reflections on emerging environmental markets are drawn out in a number of ways in this Report. Their experiences and views are considered, in particular, in terms of practice, law and policy.

## 1.2 Context

### 1.2.1 Payments for ecosystem services (PES) and environmental markets

The provision of ‘ecosystem goods and services’ by natural systems is fundamental to the wellbeing of societies. Concepts of ecosystem services, or ecosystem goods and services, are referred to in our first Report, *Land-based environmental markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria*. Increasingly governments and private organisations have used this model of natural systems to underpin conservation financing models in the form of ‘payments for ecosystem services’ (‘PES’) schemes. Market-based mechanisms are an important type of PES arrangement. Again, this is referred to in Report 1. For the sake of context and clarity, some revisiting of this terminology and language is useful here.

Ecosystem service approaches and concepts provide a framework for the accommodation of natural systems and processes to human systems and processes, including science, law and economics, each of which are crucial to environmental market schemes.

PES schemes include the broad range of public or private financing arrangements to the ‘delivery’ of ecosystem services. In a practical sense, such schemes deliver the protection, management and/or restoration of natural systems, typically by private landowners or land managers, through financing mechanisms. Financing arrangements may be under the auspices of regulatory schemes. Alternatively, they may be delivered through entirely voluntary arrangements. The role of law in delivery and regulation will vary accordingly and depending on the intended contractual relationships between landowners and financing bodies (or intermediaries). Other elements of property law (for example, covenants over land) or public law (for example, regulatory schemes) may also play a role.

PES schemes are not restricted to financing arrangements with market elements.

‘Environmental markets’ denote a form of contestability among ‘suppliers’ of ecosystem services (for example, landowners) or ‘purchasers’ (for example, funders) or both. In some situations, the appearance of this contestability is reasonably obvious. In the legal sense, the market is an ‘area of close competition’ or ‘field of rivalry’, where there is scope for substitution between ‘products’ or sources of supply, in particular responding to price signals.<sup>5</sup> Conservation tender schemes fit this market model through the systematic organisation of a ‘field’ of competitive bidding. Whether PES schemes based on direct grants fit this market model depends perhaps on the detail of the scheme at issue. For instance, if grants are made to landowners on a ‘take-it-or-leave-it’ basis, according to the criteria of the funding agency, there appears to be little in the way of a ‘competitive field’. Yet, if grant funding is available on the basis of competitive application, according to ecological criteria (rather than price or where there is a fixed price), then perhaps an environmental market, in the legal sense, does operate.

For the purposes of this report, the following terms apply.

- **‘Environmental markets’** are conceived as transactional arrangements, with competitive or contestable elements, providing for protection, management and/or restoration of ecological and land management values on private land.
- **‘Market schemes’** are the particular body of rules, institutions, practices and subject-matter associated with transactions, such as native vegetation offsets markets, conservation tender, or carbon offsets markets.
- **‘Payment for ecosystem services’ (‘PES’) schemes** include broader class of payment systems, such as direct grants without competitive elements.

### 1.2.2 Social research of landowners involved in environmental markets and stewardship schemes

There is a growing body of literature investigating the behaviours, dispositions and attitudes of landowners toward conservation programs and initiatives in Australia. This includes research into voluntary programs such as Landcare<sup>6</sup> as well as research (for example, over the past decade) into market-based<sup>7</sup> and other incentive<sup>8</sup> programs designed to achieve conservation outcomes, in particular those aimed at habitat restoration and biodiversity gains but also programs aimed at land protection.<sup>9</sup> Academic work in this field has been accompanied by review programs of the various tender schemes rolled out since the early 2000s, the latter having also provided useful social research on landowner experiences and perceptions of these types of market mechanisms.<sup>10</sup>

In a recent socio-ecological study of private land conservation in Victoria, Race et al have noted: ‘Management of native vegetation on private land is shaped by social, economic and agronomic factors influencing landholders. These factors are also influenced, to greater or lesser degree, by the policy context. Determining the relative importance of these influential factors... is important for those seeking changes to NRM outcomes.’<sup>11</sup> In this study, the authors use social research techniques to investigate sociological dimensions to natural resources (native vegetation) management on private land. What the study highlights – as economic studies of natural resources management (‘NRM’)<sup>12</sup> equally highlight – is that the realities of landscape management are multi-disciplinary in character and that broad social forces play a central role in those processes.

In general, social research into private land conservation, and market approaches in particular, reveals an important series of issues, some of which inform our work. Those themes include:

- the significance of social capital;
- the importance of relationships between ‘purchaser’ agency staff and landowners;
- the desire for transparency and legal certainty in arrangements;
- the importance of technical knowledge and assistance, such as with assessments, bid preparation and ongoing management;
- the capacity for incentive schemes to contribute to improved knowledge, information disclosure and management practices from both landowner and ‘purchaser’ perspective;
- landowner preferences and opinions about agreement length and content (for example, for less prescriptive, more autonomous approaches to land management);
- the capacity of schemes to facilitate an existing or latent conservation/stewardship ethic and encourage conservation actions and practices; and
- the potentially problematic character of fixed-term financing cycles.

### **1.3 Surveying landowners about their motivations and experiences: methods used**

Semi-structured interviews were conducted with 17 landowners<sup>13</sup> by in-person interviews carried out in late 2013. Interviews ranged from less than one hour to up to one and half hours. A standard schedule of questions was prepared, although discussions departed from that schedule where it was useful to do so and to explore particular themes or lines of enquiry.

Interviewees were identified and selected through NRM networks, including but not solely through the assistance of regional staff of Trust for Nature. We interviewed landowners across geographic regions of Victoria; landowners who had been involved in one or more of the available tender schemes or offsets schemes and in relation to different ‘ecosystem services’ provided, including biodiversity conservation and carbon sequestration. A schematic overview of the participants is included in Table 1.

Importantly, the nature of this sample may be affected by the method of recruitment, in particular by being through Trust for Nature and NRM networks. It is reasonable to assume that landowners outside of these networks may have participated or are participating in market schemes with different motivations, experiences and insights than those interviewed, however a broad based and large sample of general landowners was beyond the scope of our resources. Recruitment methods may have biased this sample accordingly toward participants with greater conservation ethics.

As Table 1 indicates, the majority of interviewees were involved in tender schemes, including Bush Tender, Saltmarsh Tender and regional Habitat Tender schemes run through Catchment Management Authorities. Those involved in offsets programs included participants in Victorian native vegetation offsets, operating under Victoria’s Native Vegetation Management Framework, as well as Federal offsets under the regulatory framework of the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Two interviewees were involved in markets for carbon sequestration, as well as biodiversity offsets markets. Interviewees could broadly be classified as either 'mixed income' land managers,<sup>14</sup> agribusiness, environmental market business operators, not-for-profit entities, or public authorities. These classifications are not necessarily straightforward. For instance, 'mixed income' land managers who participate in environmental market schemes may also be involved in some form of (minor) primary production, or those classified as 'agribusiness' land managers may engage in market schemes for 'amenity' reasons or diversifying income purposes.

Given the size of the sample and the semi-structured nature of the interviews, it is preferable to discuss the issues and content of these discussions more in terms of 'themes' or 'issues', rather than 'findings' or systematic conclusions. Some of these themes and issues are considered below and summarised under 'Interview results'. These results also point the way for further enquiries and research.

#### **1.4 Consultation with NRM experts**

Draft themes and results from research and interviews undertaken, as well as from our first Report, *Land-based environmental markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria*, were presented to a workshop in May 2014. Workshop participants included individuals with NRM expertise, inclusive of Catchment Management Authorities, local government, state government departments, private sector consultants, land trust and non-government private land conservation bodies. *Draft Best Practice Principles for environmental market schemes* from our first Report were considered as part of this workshop and followed on from earlier workshops and presentations to Victoria Naturally Alliance membership as well a significant number of Trust for Nature's regional operations staff in 2013 and 2014. Feedback from these workshops has been used to inform this report.

**Table 1: Characteristics of private land managers interviewed**

N	Approx. property size (ha)	Region	Commercial character	Scheme	Legal entity
1	20	North Central	Mixed income	Biodiversity offsets	Individual
2	90	Corangamite	Agribusiness	Biodiversity offset	Trust
3	50	Glenelg Hopkins	Mixed income	Tender	Individual
4	240	Glenelg Hopkins	Mixed income	Tender	Individual
5	16	Glenelg Hopkins	Mixed income	Tender	Individual
6	N/A	Various	Environmental market business	Carbon (voluntary and Carbon Farming Initiative), biodiversity offsets, tender	N/A
7	240	North East	Mixed income	Tender	Corporate
8	300	Port Phillip	Non-government organisation	Tender	Corporate
9	1200	North East	Agribusiness	Tender	Corporate
10	8 (protected)	West Gippsland	Agribusiness	Tender	Individual
11	13	West Gippsland	Mixed income	Tender	Individual
12	5.6	West Gippsland	Mixed income	Tender	Individual
13	40	North East	Non-government organisation	Tender	Trust
14	Various, 16-2500	Various	Environmental market business	carbon (voluntary), biodiversity offsets	Corporate
15	70	Port Phillip	Public entity	Biodiversity offsets	Statutory
16	280	Port Phillip	Mixed income	Biodiversity offsets	Corporate
17	520	West Gippsland	Agribusiness	Tender, biodiversity offsets	Individual



Silver Banksia (*Banksia marginata*); photo: Trust for Nature.

## Part 2 Landowner motivations and experiences of environmental markets

Understanding what motivates different parties to enter into a contractual arrangement, in addition to understanding the nature of the goods and services the contract relates to, could help shape what legal information and safeguards surrounding transactions should be provided. For this reason, private landowner interviews examined their motivations and preferences in relation to environmental markets.

### 2.1 The conservation and stewardship ethic

Across all land managers interviewed some form of conservation or stewardship ethic was found to be a common motivation, regardless of which market-based scheme they were participating in, scale or particular circumstances.

For example, interviewee R2, an agribusiness operator, developed an interest in native grasslands in the locality over a long period of time when moving sheep around, in particular a particular patch of remnant native grassland, which he has purchased and managed for conservation values. He was self-taught and acquired this interest long before the availability of environmental market schemes. The land manager for whom interviewee R9 was an agent and manager, also an agribusiness operator, was motivated by a desire to undertake good environmental management and integrate that program into broader property planning.<sup>15</sup> Interviewees R6 and R14 had engaged in these schemes at a more systematic and commercial level but still a leading motivation was good environmental management. Both were seeking ways to place conservation action and funding on a commercial basis, an approach somewhat distinct, if related, to mere integration of conservation into ordinary primary production. Mixed income land managers interviewed typically had strong connections to their landholdings and the environmental values attached to them.

The remark of interviewee R16 is telling in this respect:

I think there are a lot of jobs where if you're not into the product then you shouldn't be doing the job... [with] an offset scheme, if you're not fundamentally 'green' you'll be looking for short cuts and if you do that you'll just get regrowth and you won't get the end result.

The interviews suggest that the interaction of environmental market finance and conservation approaches among landowners has two effects in land management practices. One of these is allow latent conservation plans and intentions to be realised through contractual payments. The second is the capacity of financing and contractual arrangements to provide a business discipline to the delivery of conservation programs. As R1 noted: 'With funds you can do [ecological work] better... you are accountable... Good intentions are fine but [the scheme] additionally provides commercial or business discipline'. These interviewees noted they did work a lot quicker and in a more organised and systematic fashion with funds and a business model behind them. Interviewee R12 emphasised at the outset that the importance of these programs was to 'bring conservation into the mainstream economy.'

In summary, the interaction of environmental market schemes and conservation ethics noted in interviews suggests for these land managers at least, there are synergies between conservation and commercial attitudes and practices.

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Interview results: Some element of a conservation or land stewardship ethic underpins the motivations of all market scheme participants interviewed, including those with smaller landholdings and larger agribusiness operators.

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## 2.2 Concerns and challenges

Environmental market schemes being relatively new in Australia, improvements are being made all the time as lessons are learnt. Land managers interviewed highlighted some concerns and challenges with environmental market scheme implementation that could be improved while at the same time expressing broad support for market-based approaches.

The concerns or challenges that arise tend to be, first, in respect of implementation or operational issues and, second, ancillary legal issues, such as taxation. These issues most often involve administrative or public law principles, regulatory frameworks and precedents.

Areas identified for potential administrative improvements for environmental market scheme administration and operation include:

- inflexibilities in contract and management plan;<sup>16</sup>
- complexities arising for landowners from the fragmentation of environmental market schemes, and different policy frameworks between jurisdictions and purchasers, resulting in a number of legal and practical issues;
- the handling of transactional mistakes and technical errors;
- lack of or inadequate responsiveness or bureaucratic inertia;
- lack of general advice, for instance, in regards to tax implications;
- complaints or dispute handling mechanisms; and
- lack of project management expertise for administration of large-scale projects.

Many of these issues involve overlapping matters of scheme implementation, practice and administration, law (for example, contracts) and policy (for example, scheme design).

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**Interview results:** Land manager experiences of environmental markets lead to identifiable areas for administrative and contract management improvements that could be made especially in implementation and in scheme operation.

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## Recommendation 1

The following areas for potential administrative and contract management improvements could be considered by environmental market scheme designers and administrators:

- increase flexibility in relation to contracts and management plan activities;
- reduce complexities arising for landowners from the fragmentation of environmental market schemes and policy frameworks between jurisdictions and purchasers that give rise to a number of legal and practical issues;
- improve how transactional mistakes and technical errors are handled;
- address the risks of landowners' disenchantment with:
  - scheme administrator inertia or bureaucratic responses, and
  - lack of general advice about legal implications, for example, in regards to tax;
- create appropriate and efficient complaints- or dispute-handling mechanisms.

### 2.3 Preference for working with local agencies and staff

Depending on the financing arrangements for an environmental market scheme, landowners may be dealing with local or regional agencies, such as Catchment Management Authorities, or larger, centralised agencies or institutions, such as government departments or institutional funders (for example, private offset purchasers) or large not-for-profit conservation organisations.

Generally, land manager interviewees had broad consensus of good positive working relationships with local agencies. However, interviewees referred to some dealings with central offices to be particularly difficult and the source of frustration or dispute. On occasion (R13), local staff had effectively acted as important dispute resolution agents, if not advocates, for landowners in difficult dealings with central agencies. It might be expected that this type of dynamic is not uncommon in problem-solving in relation to these schemes.

Consistent with other studies,<sup>17</sup> interviews highlighted the importance and role of strong support services and infrastructure to the operation of market schemes.

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**Interview results:** Dealings with local staff and agencies were preferred by landowners, notably for relationship-building, problem-solving, trust and mutual education. Where relevant, landowners reported relationships with central agencies or offices generally, although not universally, as more strained or problematic.

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## 2.4 Important role of networks in informing participants and resolving problems

Landowners interviewed reported local networks to be especially significant in processes of learning about environmental market scheme opportunities and also ongoing feedback, learning and engagement. In addition, organised and established informal networks, both with land manager peers and NRM professionals, were reported as important in environmental learning processes, as well as learning about administrative systems and processes. In 10 cases, interviewees noted their own high level of personal knowledge and expertise associated with managing their land. On occasion, this led to important and productive exchanges between landowners and agency staff or consultants leading to the production of management plans. On other occasions, however, the personal knowledge and experience of land managers was not recognised or adopted, which led to their frustration and also errors on the part of agencies preparing management plans (R1, R4). On the other hand, at least one interviewee (R9) reported his observation of project failure in other instances due to landowner inexperience and inadequate network supports which might have developed and contributed to the landowners' knowledge and experience.

Personal and professional networks could also be significant in dealing with problems, complaints and disputes, including helping to resolve disputes.

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**Interview results:** Informal and formal networks are important to landowner engagement in schemes, ongoing knowledge and education, and transmission of views and opinions: 'communities of practice'<sup>18</sup>. This includes networks with NRM professionals, landowners and other organisations (for example, community environment groups, Landcare).

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These insights and experiences suggest landowners acquire knowledge, training and education from disparate sources and that facilitating informal exchanges of information could as be important to the success or otherwise of a environmental market scheme as any regulatory and policing approach. Informal learning and exchange can also extend to dissemination of legal information, and landowner networks would be an important place in which to deliver, for instance, community legal education relevant to market schemes.

They suggest also that, where practicable, processes of ordinary peer-review and collaboration, in respect of ecological assessments and management planning, may be instructive and valuable in the preliminary stages of management, planning and administration.

### Recommendation 2

**As seen in other land management programs such as Landcare, communities of practice and engagement, or 'social learning' processes, are important to technical knowledge of environmental market schemes, environmental management and restoration practices. Development of 'social learning' practices and methods could be considered as important to the further development and future success of environmental market approaches.**

## 2.5 Desire and need for flexibility in dealings and practices

Land managers expressed the need for flexibility in the terms of environmental market dealings in 7 out of the 17 interviews.

Key circumstances in which the desire for flexibility occurred were in relation to:

1. the timing or delivery of payments. This could be a concern for the tax implications of payments;
2. management plans and the organisation, timing and prescription of management programs and actions attached to environmental market agreements; and
3. the timing and nature of contract administrator responsiveness to landowner requests for negotiation during a contract term, queries and processing of payments.

The desire for flexibility frequently appears to concern the need for contractual rules or obligations to marry with the contingencies of ecological and business management as reasonably and efficiently as possible. Interview results also indicated the importance of appropriate staffing resources to administer environmental market schemes in a timely and responsive fashion, so as to ensure contracted milestones can be honoured. This indicates that a desire for flexibility is perhaps also indicative of the so-called 'relational' nature of contractual dealings entered into between landowners and funding bodies. The concept of a 'relational' contract refers to arrangements characterised by long-term and interdependent relationships between parties beyond a discrete transaction, by complexity, and by degrees of uncertainty and variability of relationships within the contract over time.<sup>19</sup>

Interestingly, representatives of environmental market scheme administrators attending our workshops revealed a constraint on some environmental market schemes: strong public sector probity arrangements are put in place for reverse tender/auction type schemes directed at treating all market participants equally and fairly when applying market scheme rules. These arrangements in some instances were reported as having the perverse effect of not allowing for sufficient flexibility and negotiation to meet individual farmer, landowner or entity circumstances.

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**Interview results:** Flexibility and exercise of discretion have important roles to play in the practice and delivery of environmental market programs. This might include guided or structured flexibilities in areas such as delivery of environmental management and restoration works by landowners; payment scheduling; review of actions and purchaser decisions during the course of a contract; and ability to accommodate landowner innovation or novelty. Examples of what flexibility means in different contexts are considered further below.

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Walking through the Perched boggy shrubland vegetation on a wetland property in Victoria's Goulburn Broken catchment area; photo: D. Donald, Trust for Nature.

## Part 3 Contracts and land management

Contracts are a key regulatory mechanism for the operation of market transactions. They set out the legal rights, liabilities, powers and obligations of those involved, and provide structure, certainty and a framework for interactions. Given the unique nature of managing natural assets to provide environmental goods and services, we interviewed land managers about specific aspects of their contractual relationships and dealings.

Contractual agreements in environmental markets occur between landowners and ‘purchasers’ of ecosystem services directly, and as part of a series of contracts involving development proponents; ecological consultants; and brokers helping a landowner or developer mediate a transaction, for example a credit registration agreement with a regulator in a biodiversity ‘credit’ market.

Agreements function within a wider legal framework – often complex – and may include property law considerations such as an obligation to place permanent protection on land title. Little public or academic attention appears to have been given to the nature of these agreements, but this would be helpful to understanding the rights, obligations and liabilities given effect by them. What is also significant is the manner in which environmental management and restoration is legally framed in these types of agreements and the way in which the law is to be considered and applied.

### 3.1 Ecosystem services contracts

Contracts for the provision of ecosystem services entered into by landowners are effectively a marriage of legal form (contract and contractual obligations) and ecological realities.

The ecological substance of agreements could and should be influential in how contract terms are developed and interpreted, particularly in relation to dispute resolution clauses, default and remedy provisions, and flexibility in meeting management outcomes/action obligations. How contracts accommodate ecological risks and uncertainties should also be a consideration. As the Katoomba Group has noted,<sup>20</sup> in discussion of model forest carbon agreements (a type of ecosystem services contract):

While they resemble typical purchase agreements in many ways, forest carbon purchase agreements are likely to have unique aspects. For example:

- where the agreement describes a forward purchase of [ecosystem credits], robust project design and governance will be central to the contract;
- structuring payments may be challenging, particularly where advanced payments are needed or multiple sellers are involved;
- diverse risks must be allocated between the parties to a forward purchase agreement for forest carbon.

These points could be equally made about the characteristics of all types of natural ecosystem service agreements.

Ecosystem services contracts might ordinarily be characterised as 'long-term' contracts,<sup>21</sup> spanning 5 or 10 years or more. It is not surprising that landowners interviewed identified ongoing maintenance of relationships between parties as important, pointing to these types of agreements being also appropriately described as a form of 'relational' contract.<sup>22</sup> This means anticipation of long-term contract management issues ought to be addressed in high drafting and preparation of agreements. These issues can include a need for flexibility, dealing with unforeseen or changed circumstances, providing scope for renegotiation in appropriate circumstances, and the astute and timely management of problems and disputes.<sup>23</sup>

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**Interview and research results:** 'Ecosystem services contracts' are emerging as a particular type of contract, characterised by a syntheses of legal forms, ecological realities and substance, and commercial practices.

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### Recommendation 3

**Because ecosystem services contracts typically involve long-term relationships, consideration could be given in the contract to the need to accommodate dealing with unforeseen or changed circumstances, to providing scope for renegotiation in appropriate circumstances, and for astute and timely management of problems and disputes.**

#### 3.1.1 Examples of contracts: structure and content

A number of market-based private land conservation contracts were obtained as part of the research. These include contracts implementing conservation tender arrangements and 'credit trading agreements' which implement biodiversity offset arrangements. In one instance, the contract was a 'precedent' document, used as a template for conservation agreements under biodiversity offsets. Generally, these agreements are structured into two parts: the main body of the contract, providing for the bases of the agreement and operative terms and conditions; and detailed schedules to the agreement detailing management plans, schedules of management action, payments, and so forth.

Content of the main body of agreements varies also, especially according to the agency with which landowners are contracting. A schematic overview of this content is reproduced in Table 2.

**Table 2: Content characteristics of sample ecosystem services contracts**

Form of clause	Agreement						
	1	2	3	4	5	6	7
N	1	2	3	4	5	6	7
Year of signing contract	ND <sup>24</sup>	2010	2011	2008	2007	2007	2002
Statement of key facts, objects and purposes of the contract (recitals)	•	•	•			•	
Definitions/interpretation	•	•	•	•	•	•	•
Description of the land	•	•	•	•	•	•	•
Statements of obligations	•	•	•	•	•	•	•
Payments	•	•	•	•	•	•	•
Assignment			•	•	•		•
Management plan/actions	•	•	•	•	•	•	•
Provision of advice to landowner	•				•		
Indemnities		•	•	•	•	•	•
Access to land	•	•	•	•	•	•	•
Default	•	•				•	
Termination	•		•	•	•	•	•
Variation	•		•	•	•	•	•
Tax (for example, GST)	•	•		•			
Public liability insurance		•					
Disputes							
Severance	•					•	
Warranties	•						
Unforeseen events, <i>force majeure</i>	•				•	•	
Reporting		•	•	•	•	•	•
Waiver of powers or rights	•					•	
Incidental costs of agreement	•	•				•	
Consent of mortgagee (for example, a bank or financial institution)						•	
Form of notice	•			•		•	
Governing law and jurisdiction	•		•	•	•	•	•

### 3.1.2 Negotiations and the ‘meeting of minds’

An underpinning principle of contract law is that there is an agreement by those who are party to it and voluntary assumption of rights and obligations. In some forms of contract, the process of offer and acceptance may be cursory, or subject to no negotiation whatsoever, or established by actions rather than negotiations (unilateral contracts). However, there must be an agreement, or ‘meeting of minds’. In environmental market transactions, formal written contracts are entered into, so there is clear written evidence of what is agreed. Landowners interviewed had varied experiences of the process of agreement-making.

### 3.1.3 ‘Take-it-or-leave-it’ contracts

‘Take-it-or-leave-it’ contracts are sometimes referred to as ‘standard form’ contracts or, more precisely, ‘contracts of adhesion.’<sup>25</sup> Acceptance of the agreement by the person (landowner) to whom the offer is made is on the basis of the terms set out by the person making the offer. But also this dynamic of agreement-making is characterised by imbalances of power between parties, of which one party may take advantage to the detriment of another party’s interests.<sup>26</sup> For environmental agreements, this may be the main body of the contract, as well as accompanying land management actions which a ‘purchaser’ deems appropriate or necessary.

Landowners interviewed had a range of negotiation and experiences of ‘purchaser’ or regulator exercise of power. A key point in the transaction process where negotiations are likely to occur is in ecological assessment of the land and development of management plans and actions. Landowner experiences were mixed on this issue. In a number of instances, landowners spoke of very positive and constructive experiences with assessors. In a few instances, the experience was not so interactive. Far less negotiation appears to operate in relation to the main terms of contracts, although there were exceptional cases in which that occurred.

‘Take-it-or-leave-it’ contract dynamics were identified in 6 of 17 interviews conducted. Some of these responses were critical of that dynamic, some neutral. The existence of power dynamics – and potential imbalances – demonstrates the need for care in design of contracting processes attached to environmental markets.

Management planning forms a substantial part of contractual commitments by landowners. In circumstances, for instance, where landowners relatively inexperienced in environmental management are parties to agreements, authoritative guidance (and management terms) from agency staff may be appropriate, even welcome. In other cases, landowners are themselves experienced in environmental management and more robust discussions and negotiations may be appropriate.

It is noted that there is the possibility in certain circumstances within environmental markets that ‘suppliers’ of ecosystem services – landowners – may have meaningful or substantial power within a market,<sup>27</sup> in which case a situation of bargaining equality or parity can exist and, in those circumstances, it is less likely that contracts would assume a ‘take-it-or-leave-it’ form. Rather, contractual outcomes would be the product of circumstances approximating ordinary commercial negotiations. Hence, there were landowners we interviewed for whom the bargaining situation was more negotiable. For instance, R9, acting on behalf of a large landowner, noted quite a lot of negotiations over the management program over a period of some weeks. R16 was also involved in a large project over which substantial negotiations occurred, including through lawyers. R14 was also engaged in offset markets on a commercial basis and dealings with

'purchasers' operated in more commercial footings. In one further case (R15), the landowner supplying ecosystem services was a public authority, a relatively unique model of delivery but one likely to become more commonplace in the private and public sectors if providers establish more strategic 'conservation banks'. In this particular situation, extensive processes of negotiation and assessment occurred between the authority, as offset 'supplier', and the intermediate body (broker) with whom biodiversity offset obligations were entered into, demonstrating the chain of necessary contracts between permit holder (offset purchaser), intermediary (broker) and landowner (offset supplier) to make one environmental market transaction.

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**Interview and research results:** A spectrum of transactional power operates between 'suppliers' of ecosystem services and 'purchasers', although generally greater power in dealings lies with 'purchasers'. 'Take-it-or-leave-it' contracts do operate in some environmental market transactions.

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#### Recommendation 4

**The design and policies guiding the operation of environmental markets and mechanisms could be further considered in relation to 'take-it-or-leave-it' standard form contract transactions to ensure landowners have appropriate protections and standards of procedural and substantive fairness.**

### 3.2 Bid preparation in case of tenders

For those landowners participating in reverse auction/tender schemes, whether run out of a Government department or other agency (such as a Catchment Management Authority), preparation of a sealed bid will be part of the 'auction' process,<sup>28</sup> following expressions of interest and site assessment. In many cases, for landowners bid preparation appeared to be a relatively straightforward exercise, based on calculations including capital costs (for example, fencing, sprays) and estimates of labour costs (either the landowner's own labour or contracted labour). This exercise was more likely to be straightforward for landowners with either NRM or primary production familiarity with costing land management activities.

Several interviewees commented on the bidding process. Key observations included:

- a lack of guidance on the question of bid preparation –
  - ecological assessors were a helpful resource, but offered little assistance on bid processes
  - indicative pricing guidance would be appropriate, analogous to tender processes in other sectors, such as agribusiness;<sup>29</sup>and
- there is potential for landowners to experience problems as a result of inadequate information, inexperience, or miscalculation, in bid preparation –
  - landowners' successful delivery of land management programs may be compromised by under-bidding. This was associated with failure to factor in incidental costs, such as transaction costs (for example legal costs, agency fees and charges), or insufficient knowledge or appreciation of the expense or investment required to meet obligations

- o in one interviewee's estimation, emphasis was on the cheapness of the bid<sup>30</sup>
- o a key gap is a lack of skills in bid preparation for tenders.<sup>31</sup>

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**Interview results:** There are variable levels of skill and abilities in reverse auction/tenders bid preparations that could jeopardise intended outcomes from a market scheme.

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## Recommendation 5

Consideration could be given to variable levels of targeted landowner skill and ability in pricing land management activities as well as reverse auction/tender bid preparation, by large 'purchasers' offering preparatory training and guidance on bid preparation and pricing to ensure common base levels of knowledge. Tender preparation approaches in other sectors (for example, agribusiness) could be investigated for alternate models, particularly in relation to price guidance.

## 3.3 Content of land management contracts

### 3.3.1 The land management program or plan

The land management program is generally found in a schedule to the contract and reference made to it in the body of the agreement. Leaving aside matters to do with reporting, allocation of risk, and dispute resolution (considered further below), the content and construction of ecosystem services contracts appear to contain some significant variations in drafting. This may be seen in the schematic overview in Table 2. Viewed alongside landowners' experiences and views, this overview highlights certain standard provisions within these agreements, including:

- the land management program, plan or project the landowner is committing to;
- definitions or interpretations;
- description of the land at issue;
- statements of the parties' obligations;
- indemnities (of the purchasing/regulatory body by the landowner);
- termination;
- access to land for inspections and compliance activity;
- variation of the agreement;
- reporting; and
- provisions for governing law and jurisdiction to guide interpretation.

However, not all agreements include the above standard clauses and while terms and conditions relating to termination, variation or governing laws appear to be commonplace, they are not universal.

Separately, investigations revealed that contractual clauses relating to the following matters could be found in only a few or minority of contracts:

- disputes;
- severability of parts of the agreements;
- *force majeure* events (unforeseen or supervening events as distinct from default);
- waiver of power or rights;
- incidental costs of the agreement; and
- costs of obtaining any necessary consents , for example mortgagee consent from a bank.

### 3.3.2 Assessment and reporting

One of the important distinguishing features of ecosystem services agreements is the need for expert assessment of ecological merits and functions to be secured by the contract. Given the subject-matter of the contract – to manage and/or restore environmental assets and improve the functioning of ecological processes – scientifically based verification and assessment of these features of the land is necessary. Ordinarily, this occurs at the point of preliminary assessment of the land, prior to entry into an agreement, followed by periodic reporting and/or inspection as the key forms of monitoring. In the case of one interviewee an error occurred in the original assessment of the biodiversity values by the ‘purchaser’, creating a problem for the landowner in later reporting and verification requirements for management actions under the contract.<sup>32</sup>

Both the available contract documents and interviews with landowners confirm as standard practice a requirement for self-reporting by the landowner against management plans and actions scheduled to the body of the agreement.

Standard provisions allow for access to the land, on reasonable notice, by staff or agents of the ‘purchaser’ or regulator in contracts examined as well as in the experience and knowledge of interviewee landowners. These provisions are written in such a manner as to allow for compliance monitoring. A small number of interviewee landowners experienced the monitoring and reporting processes of central (rather than regional) agencies as one of compliance only.<sup>33</sup> For some smaller landowners, reporting and monitoring processes appeared not to be problematic and involved considerable goodwill and interactions that provided scope for important education and learning. In at least 2 cases, environmental management projects were large scale and reporting and verification processes were undertaken by contracted specialists who were involved in managing and overseeing the project. The specialist knowledge of contractors or employees in those instances would, it is likely, facilitate the (self) reporting and verification processes.

**Interview results:** Access to land with notice and self-reporting provisions are standard. In some instances, reporting was perceived as compliance-focused, while in other instances, assessment and reporting were viewed positively as facilitative of outcomes, knowledge and relationships.

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## Recommendation 6

**Facilitative and interactive approaches to assessment, monitoring and reporting would, where possible, be preferred by landowners over compliance-based approaches, reflecting contractual terms over several years and a priority to building constructive relationships for the longer term consistent with a proportionate and risk-based approach to contract management.**

### 3.3.3 Managing risks and uncertainties

Risk and uncertainty is common to most dealings and arrangements between individuals in many walks of life. One key task of many contracts is the assignment and organisation of risk and uncertainty between parties in a legally binding manner, attaching these factors to rights and obligations under the contract.

If well drafted, the ecosystem services contract can operate as a key risk management device for both purchasing/financing entities in environmental markets and for landowners undertaking environmental management and restoration.

Issues of risk and uncertainty raise a range of issues under the framework of contract, including:

- the possibility of contracted actions not being carried out, modified or delayed;
- the possibility of contracts being terminated;
- one party carrying responsibility (indemnifying) the other party for certain actions or conduct;
- scope to change or vary the contract;
- problems of error or mistake; and
- how problems or disputes are to be resolved and dealt with.

#### **3.8.3.1 Things can go wrong**

We noted with interest that in proposing model elements of forest carbon agreements, Hawkins et al observed the following about how easily ‘things can go wrong’ in relation to natural resource management projects:

There are innumerable ways in which a forest carbon project can go wrong, destroying all or part of the value of the deal for one or more of the parties. When this happens, parties often look to the purchase agreement to see if another party can be held responsible or if any of their losses are recoverable. This reality underscores the importance of contractual terms defining what is and what is not a violation of contractual obligations, and when and what remedies are available.<sup>34</sup>

That statement is valid for ecosystem services contracts in general. However, in the actual experience of a number of interviewees who had things ‘go wrong’, recourse was not so much to the written agreement

but to informal negotiations and dealings, accommodation to other parties (who may have been in more powerful positions), or absorption of losses or costs themselves.

### **3.8.3.2 Default and remedy**

Many interviewees either knew or assumed that provisions dealing with circumstances of default were in agreements. Generally, however, they were not aware of the specific content of such provisions or what rights or obligations they may have in this respect under the agreement.

Agreements containing default provisions among the sample generally also contained provisions for remedy and reference to timeframes in which remedies could occur. For landowner interviewees, the issue of default or failure to perform material obligations under contract, in a practical sense, is (or would be) dealt with informally with staff from the purchasing/financing/regulatory agency and there was commonly a sense that a pragmatic approach would prevail, either to the remedy and performance of obligations (on the side of the landowner) or to payment or withholding of payments (on the side of the 'purchaser').

The informal pragmatic approach is no doubt constructive for relationships, the achievement of ecological aims as well as avoidance of more serious disputes. It is not necessarily an optimal approach to framing the legal relationship between the parties, particularly over the long term. In part that is because problems can get beyond the scope of informal resolution. But also it is because the scope of 'events of default' ought to be properly spelt out and considered. Categories of default will likely go beyond failures to meet an obligation under the agreement. For instance, 'events of default' may include:

- insolvency, bankruptcy or dissolution of a party;
- breaches of representations or warranties;
- failure to deliver or to accept payment (or credits); and
- engaging in false or misleading conduct.

In a minority of agreements sampled, default provisions exist, although it is rare for those provisions to deal with anything other than breaches of material obligations, especially ecological management actions.

Default provisions represent a form of graduated or proportionate response to contract problems or failures. They are distinguishable from insignificant departures from the agreement terms, on the one hand, as well as the sheer impossibility of performing the agreement or parts of it ('frustration' of the contract), on the other hand. Resort to formal remedy provisions under the contract may also be viewed as graduated, so there may for instance, be notice from the defaulting party and a period in which to 'cure' problems or failures. Where this is not appropriate or possible, formal remedy provisions may be invoked. Remedy provisions may include 'delivery' of obligations by other means, or damages, or termination of the agreement.<sup>35</sup>

In the experience of landowners interviewed, where problems, constraints on delivery of management actions or the prospect of failures arise the usual response is negotiation with purchaser/financier/regulatory agencies. Given natural variabilities and constraints in ecosystem services management, it is not surprising that issues of default, 'cure' and remedy should to be dealt with recognising ecological uncertainties, and the appropriateness of adaptive management techniques in response to those uncertainties. No landowner identified, in the interview process, an experience of formal default under an agreement or a formal notice of default. Negotiation and variation of management actions required did occur. However, it should be noted that information specifically about formal default, notice or cure was not sought from interviewees.

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**Interview and research results:** Default and remedy provisions are not necessarily universal in agreements or understood in depth by landowners.

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## Recommendation 7

**Clear provisions for party default and remedy could be drafted into agreements and their content, role and functions could be explained to landowners before contracts entered into.**

### 3.8.3.3 *Force majeure*

*Force majeure* 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 (literally, 'superior force'). It may be linked to the contractual doctrine of 'frustration', in which a party is freed of its contractual obligations and the contract is terminated, but this is not necessarily the case; a party 'calling' *force majeure* may be a technique of suspending or excusing obligations under the contract without ending the contract.<sup>36</sup>

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 contemplated as being covered by this contingency, what procedures govern its use, and what are the consequences of doing so.<sup>37</sup>

The practice of ecological management include the scope for natural events to render performance of management obligations impossible, such as major flood, fire damage, or a major outbreak of pests, weeds or disease. Other events may also fall into those categories, such as a change of the law or regulation that means a landowner can no longer legally meet their obligations.

In landowner interviews, the term *force majeure* was not expressly used, although in the discussions about variability, problems meeting management obligations or the need for flexibility, the types of fundamental changes in situation that could give rise to these considerations were discussed. For instance, for one landowner (R14), operating in ecosystem services markets at a commercial level, responded that while there probably were *force majeure* clauses in the agreements he entered into (which had been drafted or negotiated with a solicitor), they were also reflective of circumstances in which he, as the landowner, is willing to take on risk, where there is a high degree of relational investment with agencies involved and there is a high degree of trust in people and agencies dealt with. The capacity for flexibility in practice enables appropriate responses to significant natural ecological variations. While there is no doubt scope for *force majeure* events to arise, at least from an environmental-management point of view, it may be that considerable efforts are taken to manage outcomes and problems (and keep contracts on foot) outside resort to *force majeure* clauses.

In the sample of written agreements available, *force majeure* provisions were rarely included. Given the obvious capacity for such events to occur in environmental management, this seems surprising. One reason for this absence may be the relatively shorter (such as 5 years) nature of some of these agreements. For example: '[In the event of default] If the default cannot be remedied, the landowner may be required to repay some of all of the management payment...' Comparable provisions in another agreement allows for the agreement to be terminated. *Force majeure* events do not necessarily require a purchaser/financier to be put back in the financial position it would have been if the landowner's obligations

had been carried out. The purchaser assumes some of the risk of unforeseen events as well. This was recognised in one sample agreement, which provided: 'If the landowner has carried out the Management Plan to the [other party's satisfaction], but a target is not achieved for reasons out of the control of the landowner, [the other party] will not withhold any payment to the landowner.'

## Recommendation 8

***Force majeure provisions could be written into agreements and their nature, content and purpose could be explained to participating landowners. Preparation of model clauses could be useful, contemplating supervening events likely to affect ecosystem services contracts and appropriate procedural steps and outcomes.***

### 3.8.3.4 Indemnities

Landowners were asked in 11 of 17 interviews whether there were indemnities written into their agreements. In most of these cases, landowners either assumed that some form of indemnity clause was written into the agreement, did not know, or had not considered or turned their mind to the question. In general, in respect of this sample, landowners were unaware either of the existence and/or content of an indemnities clause in the agreement. Detailed content of indemnities was not discussed.

Indemnities appear, nonetheless, to be a common provision in ecosystem services contracts surveyed. The indemnities are generally in the nature of indemnities to the purchaser/financier/regulator by the landowner for:

- any loss or damage for negligence, default, omission associated with the landowner's performance of their obligations, or with a breach of the agreement;
- breach of the landowner's statutory duties;
- related third party claims against the 'purchasing/financing' body; and
- costs and expenses (including legal costs) associated with obtaining a remedy against the landowner in relation to contravention of the agreement.

The indemnities tend to provide, therefore, that as a supplier of 'services' the landowner is responsible for delivering on those commitments and any problems associated with them. Two main types of indemnity are identifiable: indemnifying costs in obtaining remedies in relation to contravention of the agreement, and indemnifying against any legal costs associated with dealing with a claim. The first of these provisions may include remedies to management actions a landowner has failed to perform satisfactorily or at all, or alternatively a legal remedy. The second deals with defending or settling any claim. It is uncertain as to whether that might include the landowner indemnifying the purchaser/financier for legal costs associated with alternative dispute resolution.

These forms of indemnity seem at best ambiguous. It would be preferable that indemnities required of landowners be not only proportionate, but also be clearly drafted together with plain English explanations of what such indemnities cover, such as:

- costs of work or services performed in fulfilment of the contract that are sub-contracted out to other

parties, or where other obligations are incurred by the landowner in connection with the agreement;

- circumstances in which the landowner has failed to perform obligations, or defaulted in some other material way and not remedied, assuming it is reasonably possible to remedy the default; and
- where there are costs associated with a dispute (including legal costs) and it is reasonable, or provided in settlement of the dispute, for a landowner to indemnify the costs incurred by the other party.

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**Interview and research results:** Indemnity provisions appear to be standard in ecosystem services agreements, although interviewees were generally unaware of their existence or content in terms of the agreements they had signed.

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## Recommendation 9

**That consideration be given to clearly drafting an indemnity requirement of a landowner entering into environmental market contracts together with plain English explanations being provided about what it covers. Further that landowner indemnification of purchaser/financier parties for costs associated with default, remedy or dispute resolution, including legal costs, could be limited to reasonable costs and reflect the intended conduct and approaches of the parties to risks and particularly the uncertainties of managing ecological processes.**

### ***3.8.3.5 Other desirable provisions: mistake, and due care and skill***

In at least two instances identified by interviewees circumstances arose in which material errors were made in ecological assessments underpinning the agreements and management plans. In one case, this involved incorrect identification of Ecological Vegetation Classes ('EVCs', or ecological communities) on the property and in the other instance the error appears to have been poor or incorrect identification of priority management actions to be undertaken (rabbit control identified, when the most viable ecological management action was control of invasive plant species). Dealing with such technical shortcomings or problems caused frustration to landowners and it is likely that actual ecological outcomes were sub-optimal. In one of these instances, by extensive negotiations, the mistake was remedied in part.

These examples raise the prospect of how technical errors (or other forms of mistake) should be dealt with or contemplated in agreements. It is entirely foreseeable that, given the scope for technical complexity in ecological assessments and arrangements underpinning ecological contracts, such errors can be made. For instance, on a diverse and large parcel of land with high-quality habitat, management planning may have to contend with many different ecological communities and management zones.

This raises two issues in the drafting of agreements and in the contemplation of disputes.

First, mistake is a category of contract law and leaving it to the ordinary course of formal resolution via the courts would be difficult, protracted and expensive exercise. Mistakes may effectively undermine a contract and the problem of mistake can lead to action for its 'rectification' or remedies (including monetary damages) arising from its proof.<sup>38</sup>

Dispute procedures in the contract itself could help avoid and resolve such problems. Express terms within agreements to contend with allegations of mistake may be considered. Where mistakes are alleged, for example in ecological assessments or errors in written management plans, allowing scope for routine 'internal' review of those issues could be an expedient approach.

Second, whether or not technical errors made in the process of making these agreements constitute legally recognised mistakes, may also raise the issue of whether or not parties to the agreement have acted with due skill and care. For instance, if a consultant or person acting on behalf of a 'purchaser' undertakes or commissions an ecological assessment and it is incorrect in material ways, it may be arguable that there has been a breach of the agreement because a key term has not been complied with. That key term may be an implied term to conduct such assessment with due skill and care, meaning a particular professional skill to acceptable standards. From a landowner perspective, express terms relating to the exercise of assessments or other exercises of professional competence and judgement could usefully be written into ecosystem services contracts.

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**Interview and research results:** Mistakes do occur in environmental market transactions, including in relation to ecological (technical) assessments and technical specification of management actions required.

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## Recommendation 10

**Contractual procedures for review of assessments or decisions where mistakes are claimed could be appropriate. Consideration could be given to express provisions in contracts for actions by 'purchasing' parties and/or their agents to be carried out with due skill and care.**

### 3.8.3.6 Variation: a role for adaptive management

Contracts may be varied by the consent of the parties involved without a new contract necessarily being drawn up, so long as it is clear this is the intention of those involved.<sup>39</sup> In many of the contact documents considered in Table 2, specific variation clauses have been written into agreements, mainly to identify that any variation needs to be in writing and signed by the parties. In 12 of 17 interviews conducted landowners discussed the desirability of being able to vary agreements to recognise a particular need for flexibility and changes to environmental circumstances.

The ability to vary ecosystem services contracts is important because of the variability of the natural systems (and management requirements) underpinning the agreements and natural uncertainties with such forward-looking contracts. It is also foreseeable that dramatic or fundamental changes to the natural circumstances or ecology of the land may occur in such a way that attempts to vary the agreement would in reality result in the replacement of one agreement by another.<sup>40</sup> Landowners may have a desire to vary particular provisions within agreements, such as payment dates; forms of notice; or frequency of monitoring, but mostly the interviewees confirmed a desire for variation in the framework and directions of management actions, especially in light of changes to their knowledge, practices or approaches to environmental management of the land.

The issue of variation is also distinct from questions of default and remedy. The latter is a response to breach or prospective breach of the agreement, including as a result of environmental factors. The

intention is to restore (by remedy or cure) the originally intended agreement. Variation may be a response to similar factors (or conscious monitoring and acquired knowledge of environmental conditions) leading to a mutual intention to change the terms of the agreement, for instance, management actions or the basis of their delivery.

The unique nature of ecosystem service contracts may require a specific balancing mechanism between a strict overall framework and goals to be achieved by the agreed environmental management plan with scope to amend how that is delivered in an optimal fashion. Interviewee R2 noted this dynamic in an exchange on the topic of flexibility and variation.

Q: Is there scope with the agreement to vary or amend, have flexibility in agreement?

A: You've got to sit down and see what the goals are in the first place. They shouldn't be changed. In management, there should be a bit of scope to amend and be flexible there. But if you're accepting money, you need to accept the goals and objectives.

The next part of this conversation revealed an agreement 'evolving', to the extent that the overall intention and purposes of managing and improving a patch of threatened grassland was maintained but the practices of doing so were dynamic. The landowner in this instance had been consciously managing the site for its environmental values for many years. That is not an uncommon story. He had been acquiring knowledge and learning from other interested groups about plants, propagation and management techniques, and learning from trial and error. The offset agreement was now a structured part of this ongoing management effort, in which there had been variation in practice (such as to acquiring seed from remnant grassland species on roadside and propagating and revegetating the managed patch with them). These practices and efforts (revegetation) were accepted into the management agreement by variation.

This dynamic of ecological agreements is repeated in other interviews. It is consistent with the combination of formal management agreements, a stewardship ethic, and the need to accommodate 'evolving' management practices.

The significance of the contractual technique of variation in environmental markets is that the requirement, preference or need to vary the agreement (for instance, the terms of management schedules and perhaps payment schedules) may not merely be ad hoc or reactive. Rather, variation may be a technique to optimise performance or outcome of the agreement. Variation could be considered in the context of – or be guided by – adaptive management principles and practices. Adaptive management has become an increasingly important approach to ecosystem management. It is a model of management based on monitoring, learning, evaluation and necessary adjustment of actions and conduct, in order to improve outcomes and deal with uncertainties. Sometimes referred to as a form of 'learning by doing', adaptive management assumes that environmental management needs to change according to circumstances and knowledge and that management is essentially a dynamic process – one integrating human (such as learning, experimentation) and ecological processes. Academics have begun to consider how the 'structured decision-making' of adaptive management can be built into legal frameworks and systems.<sup>41</sup>

Principles and practices of adaptive management need not to be incorporated directly as terms into the agreement. Accompanying documents could be established as guidance to the agreement, or tools of interpretation.

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**Interview and research results:** Management practices and ecological realities underpinning ecosystem services contracts ‘evolve’ over the term of a contract and adaptive management approaches appear to be appropriately applied by way of informal contractual variation.

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## Recommendation 11

**Adaptive management approaches and principles could be considered for specific integration into environmental market program design.**

### 3.8.3.7 *Dispute resolution*

Dispute resolution is a basic facility of law and legal processes. Contracts in principle are prepared in order to set out binding rights, obligations and powers so that disputes may be avoided or, where they arise, contain means for their settlement or resolution. Efficient, appropriate means for dealing with disputes are fundamental to parties’ confidence in their agreement and parties’ participation and performance.

Formal dispute resolution mechanisms now routinely included in everyday contract provisions encompass mediation, arbitration and other forms of alternative dispute resolution such as expert assessment, or ‘neutral evaluation’ of potential disputes. All of these dispute resolution techniques can occur outside the court system.

Disputes in the context of ecosystem services contracts are distinct from some other types of environmental disputes<sup>42</sup> because they are essentially private disputes, although with a public interest dimension of managing a public good, namely ecosystem resources.

Dispute resolution provisions in ecosystem services contracts were expressly discussed with interviewees and it was a topic of some interest in a number of cases. Copies of agreements available (Table 2) were also surveyed for disputes provisions.

On the basis of those sources of information, what appears remarkable about these transactions is the lack of attention paid to dispute resolution mechanisms. None of the management agreements sampled contained specific dispute clauses (as distinct for instance from clauses dealing with potential subject-matter of disputes, such as default on management actions). In the interviews, treatment of dispute resolution mechanisms fell into one of a number of categories:

- those landowners who were not particularly aware of disputes provisions or assumed their presence and were dealing with smaller amounts of funds (perhaps up to \$15,000);
- those in a similar category but were dealing with much larger amounts of funds (\$100,000s);
- those who were quite conscious of disputes management, had dealt with disputes, and may have been critical of disputes handling procedures; and
- those who had some consciousness of disputes handling issues but had not necessarily dealt with disputes.

Representative of the first category, one landowner noted, in reference to a question about whether there were disputes or complaints clauses: 'I don't recall. I would assume there is. I would imagine you would go through an ordinary mediation process... I know a lot of these people. I would expect them to be quite reasonable. I would expect things to be resolved informally...' (R5) Or interviewee R7: 'I don't remember seeking anything like that [disputes resolution provisions]. I assume if I didn't like something there would be someone to ring up about that.'

In the second category, the responses of two interviewees are noteworthy, as they had been involved in transactions involving substantial sums of money, complexity in dealings or in management plans. One interviewee noted considerable uncertainty as to whether there were disputes provisions in the agreement and/or when they might be invoked and what they provide for. In this case, the discussion around this point was ultimately that if a serious enough dispute occurred it would be necessary to undertake a cost-benefit analysis of whether to pursue legal avenues of redress. The second interviewee knew there to be dispute clauses in the agreements at issue and, noting there had not been a significant dispute, added: 'I probably haven't thought enough about that. [There have been] some opportunities for dispute but we've always given in. [There is the issue of] what we lose if we win [the dispute]. We would lose the relationship, lose future sources of income.' (R14) This approach to potential disputation is revealing of an accommodation strategy in what is still a small, specialised market with a high degree of personal relationships involved.

Finally, those categories of landowners reasonably conscious of the issue and/or had dealt with circumstances of dispute or grievance (last two categories) were quick to identify a lack of clear, accessible or efficient means of handling disputes that got beyond the stages of informal resolution. Interviewee R10 noted:

[There was ] nothing like that in the agreement. I don't think it would have been an issue. Otherwise suing the government is pretty difficult! The only thing I can see is if we didn't meet our obligations. Or if they hadn't paid. Then we'd have to sue them for non-performance, which would be extraordinarily difficult. There was no arbitration of mediation of any sort... Or the Auditor-General or the Ombudsman...

Further references were made to complaints to the Victorian Ombudsman by two other interviewees, both of whom claimed intransigence or errors on the part of the purchaser/regulatory public agencies. In both instances, recourse to the Ombudsman appeared as the only viable avenue for resolution of the problems at issue.<sup>43</sup> In one instance, however, regional agency staff actively assisted in resolving the sources of dispute (which concerned withholding of payments). In the other instance, certain technical errors in the ecological assessment, timing of payments, and unilateral exercise of power perceived to be unreasonable and unfair (and which led to significant out-of-pocket expenses for the landowner), provided a number of sources of complaint. A complaint was prepared for the Ombudsman but not ultimately pursued, on advice that 'there wasn't really a mechanism to fight it... even though what the [agency] had done was wrong, unfair...' (R1)

The issue of dispute resolution mechanisms within the operation of environmental markets is an important one and, arguably, a matter of some priority. Good practice suggests that appropriate, efficient, accessible, inexpensive and proportionate dispute resolution mechanisms should underpin ecosystem services contracts and the institutional frameworks in which these dealings occur. The architecture of dispute resolution arrangements may differ across schemes. For instance, greater or lesser emphasis may be placed upon writing dispute procedures into contracts in an exhaustive fashion, as distinct from laying them out in accompanying policy. Ombudsman, arbitration or other 'alternative dispute resolution' mechanisms could be developed or used.

As discussed in section 2.4, disputes may be avoided altogether by peer-review processes. Such procedures will ideally be proportionate to the circumstances, so, for instance, in circumstances where environmental or financial risks are lower, peer-review processes may be less ‘arm’s length’ and perhaps undertaken within agencies or appropriate local networks (for example by local consultants). Where risks are greater, such as where highly threatened ecosystems are at issue or large-scale, commercialised projects are to be undertaken, review procedures may be more rigorous and independent. Where ‘technical’ errors arise, such as mistaken identification of ecosystems or attributes, these types of scientific or expert review procedures may detect the problem and avoid the need to recourse to legal or administrative dispute resolution procedures subsequently.

In principle, the following provisions might guide drafting and/or policy development in this area.

1. **Including a disputes resolution clause.** Contracts should contain a disputes resolution clause, which should be proportionate and graduated to the severity of the dispute or grievance. For example, disputes to be resolved informally in the first instance, through a structured process of mediation or other alternative dispute resolution process, and then through some form of binding, third-party decision-making in exhaustion of the former steps.
2. **Policy on disputes resolution.** Consideration should be given to the preparation of a specific policy on resolution of disputes in relation to ecosystem services contracts. Such a policy could be referred to in a contract disputes clause and serve to guide disputes handling, taking into account the unique nature of these contracts.
3. **Distinguishing ecological and administrative bases of disputes.** Distinction should be made in both contract clauses and any policy or other guidance between disputes that deal with ecological issues – that is, the subject-matter of the agreement – which may require expert and scientific input and knowledge, and disputes dealing with conduct, administration, construction or interpretation of agreements. In practice, these types of disputes may overlap. Appropriate dispute solution mechanisms may require expert determination or review in the case of ecological disputes, as distinct from arbitrated or even mediated resolution. Procedures for expert review or expert determination would usefully be proportionate to the scale and nature of the issues, ranging from (1) review on request to agency officers; (2) third-party review in an advisory capacity; to (3) expert determination resulting in a binding decision.<sup>44</sup> The precise nature and role of an expert in disputes avoidance or resolution could be clearly spelt out, whether in the contract or in incorporated policy.<sup>45</sup> A pragmatic approach by agencies purchasing ecosystem services from private landowners could be to maintain a list or ‘pool’ of appropriately qualified experts, internally and/or externally for such purposes.
4. **Independent, adapted and graduated handling of disputes.** Beyond informal stages, dispute resolution should include provision for recourse to independent third-party actors, such as mediators, third-party experts, arbitrators, or evaluators. Development of capacity and expertise in dispute handling in this field might be within the NRM sector, in conjunction with dispute-handling professionals with commercial experience. The optimal situation would be to have access to professionals and services with both subject-matter (ecological) expertise and dispute-handling expertise. A graduated approach to dispute resolution would require mediation, conferencing or expert evaluation (or determination) of disputes prior to (or as appropriate in place of) other binding forms of resolution, such as arbitration. Alternative dispute resolution processes have well-established principles around avoiding arbitration where ever possible and only as a last resort. These processes could be appropriately framed in agreements to limit cost and seek to preserve relationships underpinning the agreements. Where arbitration clauses are included in ecosystem services contracts

regard should be had to legislation governing commercial arbitration in the relevant jurisdiction. Most Australian jurisdictions, including Victoria, now have uniform commercial arbitration frameworks.<sup>46</sup>

5. **Explain to and educate landowners about disputes provisions.** Dispute resolution processes and provisions should be brought to the attention of parties to the agreements, especially landowners who are likely not to have drafted the standard form agreements. The nature and purposes are various measures, such as mediation, expert determination or arbitration should be clearly explained.

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Interview and research results: Availability of appropriately drafted disputes- (and/or complaints-) handling mechanisms are a significant gap in contract and policy design. Limited knowledge and capacity was found among landowner interviewees regarding disputes and complaint handling, especially beyond informal resolution of disputes.

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## Recommendation 12

**Further consideration could be given to development of disputes and complaints handling mechanisms in ecosystem service contracts, along with the development of supporting policies and program design.**

### ***3.8.3.8 Incorporation of terms into contracts: by reference to policy***

For the sake of efficiency, practicality or clarity, it may be preferable to document specific measures (or elements of them) of the contractual relationship, such as adaptive management principles or disputes procedures, outside the main text of the ecosystem services contract. Those measures might, then, be included in distinct schedules to the agreement. Alternatively, if these are measures or approaches common to a class of transactions or market participants, the better approach may be to develop separate policies to guide action and processes under the contract. Use of policy to inform or construe contracts is commonplace in certain other types of contracts, such as contracts of employment.<sup>47</sup>

The benefit of such an approach would be the capacity to develop substantial, well-informed instruments relevant to key aspects of the relationships between landowners ('suppliers') and funding bodies ('purchasers') and other parties as relevant, to develop them in collaborative ways within the sector, and to provide reasonably flexible means of varying those instruments from time to time.

Drawbacks to this approach should be clearly contemplated and worked through, however, by agencies or bodies seeking to refer to policy documents in the formation and/or operation of contractual relationships. In particular, the status of policy documents within the contract should be carefully considered, in order to express clearly the intentions of the parties: whether they are to be incorporated as terms within the ecosystem services contract, or whether they are 'collateral' documents intended to guide and inform contractual provisions to which they relate. For example, it may be preferable to outline the key architecture of disputes handling provisions in the text of the contract but also refer to broader policy and explanation of the disputes resolution mechanisms to inform the manner and purposes of those clauses in the context of environmental management and restoration. Alternatively, the disputes clause in the agreement could make provision for prescriptive policy to operate as an express term of the agreement, thereby keeping the content of the former clause to a minimum.

The technique of policy reference in contractual drafting, applied to ecosystem services provision, no doubt needs to be approached carefully and with regard to interpretative approaches taken by the courts to the incorporation of contract terms by reference. The specific language and wording used in the contract and in policy documents should denote clearly what if anything is promissory, what is aspirational or interpretive (guidance). The timing and context of the use of policy documents should be considered.<sup>48</sup>

Context might include important factors in these types of contractual relationships, such as disparities in power between parties and how principles of interpretation may apply to standard form contracts (bearing in mind that the more powerful party in these circumstances will ordinarily be the one drafting policy documents),<sup>49</sup> and the wider institutional and governance setting in which contracts and policies are being developed. For instance, where there is a strong public interest element to the making of ecosystem services agreements, such as delivery of government policy or high degrees of public regulation over actions and conduct, wider involvement of affected sectors and interested actors in development of policy tools may be relevant. In short, development of policies to guide or regulate conduct under contracts might be developed by the NRM sector or relevant parts of it, as a collective and participatory enterprise.

### ***3.8.3.9 Proportionate allocation of risk***

The issue of the proportionate allocation of risk as between parties involved in environmental market transactions was a question raised in the consultations with natural resource management expertise from both public and private sectors. The remarks in this sub-section are made in the context of the point raised at that workshop.<sup>50</sup>

The discussion above considers a range of contractual devices used to manage risk and uncertainty in the applied circumstances of obligations to maintain and/or restore ecosystem services on land. That discussion and application does not consider the management of risk and uncertainty in any particular circumstance. In practice, a pressing reality in the drafting of ecosystem services contracts may be the environmental sensitivity, complexity, scale, timeframe or scope of the natural resources to be managed, which affect not only the drafting of management programs but the various 'risk management' provisions, such as those noted above. The consequences of default on a management action, for instance, may be much more severe in circumstances of management of threatened species habitat or rare ecological communities than for commonplace habitat. Monitoring requirements under adaptive management principles may be more stringent for long-term contracts managing sensitive habitat than for short-term agreements managing lower conservation significance areas. Disputes resolution procedures may be more formalised in circumstances of large institutional parties managing extensive areas of habitat than for small landowners managing small patches.

Using contract as a risk management device, as well as a regulatory tool, suggests that it may be appropriate to consider more than one class of ecosystem services contract. The drafting and operation of classes of such contract might be based, for instance, on the conservation significance of the environmental features underpinning the agreement. Hence, consideration might be given to a class of 'high risk' contract, drafted for application to management and restoration of ecosystems of high conservation significance, such as rare or threatened species habitat, areas contiguous with protected areas or features with other special attributes. This approach is broadly consistent with regulatory approaches to the classification of natural resources according to risk or threat. For example, 'risk-based' regulation of native vegetation clearing in Victoria distinguishes higher risk categories based on rare or threatened species impacted, and the classification of water resources according to categories of 'security' distinguishes delivery to activities at higher risk from constrained supply (such as maintenance of town water supply or the watering of permanent agricultural crops). It may be conceivable to place delivery

of ecosystem services management and restoration in an analogous category to these systems of risk management.

Multiple classes of contract according to criteria of risk need not be limited to classification according to conservation status. Other criteria or factors may be appropriate and necessary, such as the size, scale and complexity of the project, or the sums of finance outlaid and the timeframes over which it is anticipated the project will run.



Tree planting at Mount Elephant conservation reserve; photo: L. Brown, Mount Elephant Community Management.

## Part 4 The law – regulating and administering environmental markets

Law and regulation are fundamental to the existence and operation of environmental markets and payments for ecosystem services. Our first Report, *Land-based environmental markets and the law: the evolving legal landscape underpinning ecosystem services markets in Victoria*, identified that the regulatory bases of environmental market schemes varies from:

- prescriptive legislative approaches to private and voluntary market mechanisms underpinned by ordinary contract and property law; to
- public funding delivered under ordinary public administration frameworks.

In this part, the focus is on regulatory, administrative and legal dimensions to the existing constellation of market schemes together with how schemes for ecosystem service payments also interact with the law and market mechanisms. Direct and indirect (for example, tax) regulatory measures are also canvassed.

### 4.1 Regulatory impediments to the integration of schemes

The interaction of different financial opportunities for landowners provided by various environmental market schemes and other funding programs for conservation was discussed directly with interviewees. Whether referring to environmental market opportunities, PES schemes, traditional public sector grant payments for restoration works, or a fixed or negotiated price per hectare for permanently protecting endangered ecological communities with a covenant, all give rise to a threshold question about whether the ‘purchase’ will result in an additional conservation benefit above what may already be in place. This is referred to as ‘the additionality rule’: additionality involves the requirement that an intended conservation benefit be in excess of (in addition to) current practices and any existing environmental obligations established by law or agreement.

How additionality rules attaching to schemes and other funding opportunities interact, or can be dealt with by landowners in a coordinated fashion, were confirmed as significant issues for landowners engaged in private land conservation projects.

There are different dimensions to the question of how and why schemes can or should be coordinated or integrated. Examples include:

- funding flowing to the management of different environmental values and functions, such as biodiversity, carbon sequestration or water quality management;
- the organisation of finance via disparate schemes and purchasers, and the implications for planning at the whole-of-property level;
- the timing of payments for the purposes of environmental management planning and projects; and

- access to new or alternative finance sources for existing environmental management projects. For example, land management improvements on existing covenanted areas may give rise to eligibility questions depending on the environmental market or program approach to additionality rules.

In addition, integration or coordination of schemes is significant for a number of public interest reasons:

- the efficiency of delivery of funding opportunities, such as minimisation of transaction costs;
- the improved capacity of landowners to negotiate and navigate their way through various schemes and opportunities; and
- the efficiency and logic of tying funding as closely as possible to the optimal ‘package’ of ecosystem benefits that can be delivered through conservation finance.

#### 4.1.1 ‘Additionality’ requirements and permanent on-title environmental obligations

Additionality is a common regulatory requirement. It establishes that participation in an environmental funding opportunity is dependent on beneficial activities being undertaken beyond ‘business as usual’ (practical additionality) and what is already required by law or under agreement (regulatory additionality). Additionality rules seek to guarantee environmental gains for financial investments made and prevent ‘double dipping’.

Landowners may be excluded from participation in future funding opportunities where permanent, on-title conservation measures, such as conservation covenants, have been entered into, or are entered into as a condition of scheme participation. While on-title conservation obligations are in perpetuity, payments that attach to schemes requiring such on-title protection (for example in return for an incentive payment per hectare paid under a National Landcare Program project or under a native vegetation offset scheme established to meet demand as a result of planning approval for development) are finite and limited. Both the permanent protection and land management improvements are intended to facilitate improved environmental outcomes. For native vegetation offsets, although the funding stream takes into account the opportunity cost of putting in place permanent protection, revenue will typically last 10 years. The intention is that over the funded (contracted) period, management actions will deliver sufficient environmental gains to allow ecological improvements and restoration to be ongoing or self-sustaining.

The common practice of providing substantial upfront payments to ‘get on top’ of management issues early, such as weed and pest control and fencing, is usefully targeted to this outcome. In some instances, that approach may be appropriate and sufficient. However, there are other instances – most notably in highly degraded ecosystems and modified landscapes – where sourcing finance for long-term environmental management may require participation in other market schemes or payment opportunities in order to avoid risk of deterioration of environmental repair and loss of gains already achieved. The challenges attached to long-term, indeed perpetual, management of landscapes were noted by a number of interviewees, particularly interviewees dealing with highly modified and/or degraded landscapes or landscapes in peri-urban settings.<sup>51</sup> This challenge may be significantly underestimated in current market scheme design and in the interactions of additionality rules and financing structures.

Aside from environmental and native vegetation offsets required as a result of regulation and planning controls, many public sector-financed PES and environmental market schemes prioritise landholders

voluntarily undertaking to enter into permanent on-title protection of land as part of their participation in a scheme. This may or may not involve an identifiable separate capital payment for agreeing to on-title protection, as distinct from monies paid for land management improvements. While entering into a native vegetation or environmental offset agreement may be a technical possibility for properties within high-growth regional areas, some interviewees revealed landowners may be reluctant to place permanent conservation protection on land if the future environmental market income-producing potential of that land may be lost or diminished. Additionality rules are clearly necessary and enabling a disciplined approach to the development of environmental markets; however, the challenge remains how to avoid these rules creating any perverse outcomes and disincentives from timely protection of diminishing natural resources on private land.

Landowners applying conservation covenants to their land as a condition of participation in a market scheme will already be under an existing statutory duty to take reasonable steps to avoid causing land degradation, to protect water resources and to eradicate invasive species.<sup>52</sup> The conservation covenant will ordinarily impose further restrictions into the future such as limiting stock access, not removing fallen timber, not clearing native vegetation, and/or maintaining reasonable control of weeds and invasive species in line with a landowner's general statutory duties.

Conservation covenants applied in combination with environmental market payments and incentives for ecosystem services in Victoria have the required management program and actions 'attached' to the deed of covenant for the duration of the 'positive obligations' under the agreement.

Over the life of an environmental market agreement of 5 years (for example, BushTender) or 10 years duration (for example, Native Vegetation Credit (offset) Agreement) the covenant will be securing positive obligations, for example requirements to construct fencing, control of invasive species and/or revegetation or other restoration works, usually to fixed or negotiated targets<sup>53</sup>, and have the practical effect of 'raising the bar' of the standard of land management on the property.

Statutory forms of covenants such as those provided for under the Victorian Conservation Trust Act 1972 section 3A allow for both restrictive and positive obligations to be encompassed by the deed of covenant registered on title. This enables time-limited application of positive obligations (for example, for the period of an ecosystem services contract), and provides scope for landowners to enter into subsequent funding agreements under available market schemes. This may allow for improved integration of schemes over time and remove disincentives to the adoption of on-title conservation obligations. Interviewee R14, an experienced market participant, remarked:

Additionality has been essential to carbon markets from the outset. Those rules need to be there but I can see there are issues here [such as] being locked out of future markets and transactions because of on-title protection.<sup>54</sup>

Given the possibility of positive obligations on-title limiting future scope for funding opportunities, where additionality requirements operate, consideration might be given to re-drafting covenants so, for example:

- negative and positive covenants are clearly distinguished;
- execution of any positive obligations, such as those distinguishable by the expenditure of time or effort, are subject to the provision of appropriate funding to facilitate the delivery of those obligations.

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**Interview and research results:** Additionality requirements are important and supported in general, but conflicts and tension can operate between regulatory additionality rules and permanent, on-title environmental obligations. These tensions are noted by landowners. Different strategies may be considered to address this, such as alternative funding rules or modifications to the drafting of conservation covenants.

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#### 4.1.2 Negotiating the multitude of schemes: bundling and stacking environmental market opportunities

Environmental market schemes typically are targeted to funding particular ecological outcomes, such as biodiversity improvements, carbon sequestration, or water quality. Obviously, funding one aspect of ecosystem management may have – or is even likely to have – a benefit to other ecosystem functions or social functions ('co-benefits'). So conservation tenders ostensibly targeted to improving the quality of native vegetation will likely have water quality benefits if occurring along wetlands or streams, as well as carbon sequestration benefits. Some regulatory provisions acknowledge this inter-dependent character of natural systems in crafting additionality requirements. For example, the CFI provides that offset projects with biodiversity benefits, such as planting native vegetation, will of themselves satisfy the additionality test under that legislation if plantings occur under the terms of a conservation covenant.<sup>55</sup>

Receipt of carbon offset funding in addition to biodiversity credits funding is an example of the potential 'stacking' of conservation credits. This type of practice may be important in creating sufficient financial incentive structures to allow environmental management and restoration projects to proceed.<sup>56</sup> Stacking<sup>57</sup> or, alternatively, bundling<sup>58</sup> of credits and attached funds are key elements in allowing what we might call the greater 'inter-operability' of environmental market schemes. The need for greater interaction and inter-operability of market schemes was discussed at some length with those interviewees who had involvement in carbon and biodiversity markets. In interview R6, the landowners had substantial and innovative experience in integrating environmental market schemes into land management, especially on marginal agricultural land. Their insights into a preferred architecture of scheme interactions are noteworthy. Carbon 'farming' (payments for carbon sequestration) should preferably operate as a long-term, stable base of revenue to landowners, on which other layers of payments for ecosystem services can be built. They note however:

It's a good idea, so long as everything is properly valued... If someone plants trees for carbon but design it in such a way that they receive shelter benefits on their farm, is that additionality? If we write that we've planted trees for carbon but we get other benefits is that additionality? It's a tricky one.

The tenor of this conversation, as with a number of others, is that 'double dipping' should be avoided but also that incentive payments should be integrated into ordinary land management practice (agribusiness) and regulatory measures should facilitate this approach. Other interviewees made similar remarks (for example, R12, R14, R17). As interviewee R12 remarked at the outset:

[We need to] bring conservation into the mainstream economy. [PES and Tender schemes are] a means of doing that. [We've] got to go beyond public lands. [This] needs to be part of the way the economy operates.

Forms of 'stacking' of ecosystem payments seem to be contemplated, at least among more sophisticated or commercialised landowners. Attempts at integrating PES systems via transactions targeted to 'bundled' environmental values have been made in Australia, such as through Victoria's EcoTender program in which

conservation tenders were organised around landowner 'supply' of multiple ecosystem services (habitat, catchment and water quality, carbon sequestration). In this case, a distinction might be made between single scheme in which a 'bundled' ecological valuation system was used and a process for 'bundling' multiple payments or participation in multiple schemes.

The key distinction of the latter is the capacity for landowners to function across multiple schemes, especially through the sale of credits (quantified representations of environmental values) that are recognised across all (or at least many) of them. In the US, there have been important attempts to pursue much more integrated approaches. One of the leading examples is the Willamette Partnership in Oregon.<sup>59</sup> This is an arrangement between private and public sector actors to create a 'multi-credit marketplace'.<sup>60</sup> It is based on integrated environmental accounting standards and protocols between various regulatory and financing streams. While not providing a completely integrated credit and ecosystem benefit system, 'The framework is an initial step to combine multiple ecosystem services credits but there remains a need to truly integrate these credits or bundle these services to optimize ecosystem uplift'.<sup>61</sup>

Developing the necessary standards, rules and protocols for greater integration of PES and environmental market schemes would require high levels of engagement between and effort from public sector agencies, not-for-profit bodies and private sector interests, especially landowners. It may require development of appropriate models and 'baselines' for measurement of multiple ecosystem values.<sup>62</sup> It would also require consideration as to how a registration system for environmental rights and interests may need to be configured, or alternatively in what ways integrated or coordinated credit systems may need to work around a registration system. Greater inter-operability of schemes seems a valuable initiative, however.

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**Interview and research results:** The multitude and complexity of PES and environmental market schemes exist across a number of dimensions, including subject-matter (environmental function), geography, and jurisdiction. There are regulatory and practical limits on the 'inter-operability' of various schemes.

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## Recommendation 13

**Development of procedures, standards, guidance and protocols for 'bundling' or 'stacking' payments could be considered.**

## 4.2 Tax treatment

Taxation law, policy and administration have an indirect regulatory role on PES and environmental market schemes and private land conservation generally. For instance, not only may recipients of funds under environmental market schemes be liable to have those funds included in assessable income for Federal income tax purposes, but also the complexity and fragmentation of tax treatment of landowners participating in these schemes may have an impact on their capacity or desire to participate in the future. As one landowner noted of the tax situation in relation to an offset project:

The tax implications are so complex. Nearly all of it is disadvantageous... That is a deadly serious point: those who are going to be committed to [these types of projects] are going to be useless at the complexities! You don't

need lawyers for... people doing offsets you just need people to help them through it! It's pathetic how complex government makes it for us.

Taxation issues were not prominent in all interviews. In a number of instances, especially involving tender schemes, the funds provided were not so substantial as to make a material difference to landowner decision-making nor add to complexity. Received funds were simply declared as an additional source of income to be assessed accordingly. In other instances, the entity used to receive the funds and owning the property was a body corporate or a trust. These entities may have been established expressly for the purpose of being the legal owner of the property and land at issue, often some time before participation in the environmental market scheme was contemplated.

In other instances, such as those involving offsets (where larger amounts of money may be at issue) or where ecosystem services market participation is an element of business operations, critique of tax treatment did occur, notably in relation to uncertainties around treatment and liabilities, around complexity of treatment, and around the policy of taxing activities (conservation) that are strongly public interest in nature.

From a management perspective, the timing of payments could represent an actual or potential tax concern for the landowner. As R6 noted: 'If you get paid all at once there can be big tax implications... If payments come in that form, without notice [or with little notice], it can be very difficult to do tax planning.'

The taxable treatment of income from environmental market schemes may be, for landowners in primary production in particular, less of a practical concern, given that they are familiar with dealing with payments received from diverse sources, over periodic (for example, seasonal) cycles, and in varying amounts. The issue in these cases is likely to be more one of the regularity, consistency or certainty of payments, in a manner that facilitates forward planning.

A further response from landowners operating in environmental markets has been to use, or establish, their status as primary producers, in order to achieve more advantageous tax treatment. In certain cases, landowners engaging with market mechanisms will already be classified as engaged in a 'primary production business',<sup>63</sup> as they are engaged in farming. Among other things, this status allows the landowner to claim tax deductions on 'landcare operations' and/or concessions related to carbon sequestration activities in establishing 'forestry operations'. Where landowners are not engaging in traditional farming operations, they may fall into the category of engaging in a primary production business by, for instance, harvesting native seeds for revegetation efforts. Two interviewees identified themselves as falling within this category of business operations. Interestingly, one interviewee – operating in a more commercial space in relation to environmental market schemes – noted that their environmental land management focus operates analogously to a farming enterprise, and their operations do fall within the primary production definition.

#### 4.2.1 Limitations of tax advice

Landowners also noted limitations on general and specific tax advice. One landowner identified a lack of any kind of general assistance or advice from the scheme administrator. Three interviewees identified limitations or difficulties in obtaining specific advice from tax professionals in relation to these schemes, including the need to 'educate' the advisors about what the schemes were and how they operated. Professional development for advisers to landowners would likely be helpful for accountants, lawyers and even regional banking and some real estate staff who are dealing with, or may deal with, environmental

market transactions.

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Interview and research results: Tax treatment of environmental market payments did represent a significant concern for some interviewees, more often in relation to offsets schemes, in relation to timing of payments and having regard to 'primary producer' status.

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## Recommendation 14

**Further professional development or guidance of tax advisers on the nature and implications of environmental market schemes could be desirable. ATO tax treatment information relevant to land managers undertaking land care and conservation activities on private land could be simplified; made a lot more informative and accessible to support landowners decision-making about participation in environmental incentive and market based schemes.**

## 4.3 Other issues

### 4.3.1 Social security

Social security implications of payments under market schemes were not a concern for most interviewees. Only two interviewees noted that it was a matter that had concerned them. In one case, the landowners were pensioners and, although they had not turned their mind to it, they felt that it would not affect their social security status or entitlements. In one other instance, the income derived from participation in the scheme was a matter that had to be explained to Centrelink, although they found the agency sympathetic and accommodating and there had been no adverse social security implications.

### 4.3.2 Succession planning

Succession and estate planning is a matter that was discussed with most interviewees but this factor did not appear to have major direct consequences on landowner decision-making. The issue primarily resonated with landowners in those circumstances in which market schemes required the inclusion of on-title conservation protection measures as an element of scheme participation.

Seven interviewees indicated they had dealt with estate planning issues and/or turned their mind to the question in the process of participation in the scheme. Matters dealt with included discussions with, and notification of, family of the decision. The implications of on-title conservation measures appeared to factor in decision-making in these cases but as a measure consistent with existing or intended practices. Some interviewees did note the deterrent effect on other landowners of requirements to place on-title controls on the land. In respect of interviewee R12, that requirement was, by contrast, an incentive to participate. This landowner was particularly concerned that the land should be passed on to someone willing to take it with a comparable conservation ethos. A key concern was her experience of having seen the high conservation values of other properties deteriorate for want of appropriate management.

### 4.3.3 Mortgages and financial securities

Mortgaged land and notice and discussions with financial institutions about participation in environmental market schemes were an issue in three cases. In two instances, the need to place an encumbrance on-title required notice to banks holding mortgages over property and negotiation within them. In another instance, the dealings with banks were on a more commercial footing, involving the turnover of land under mortgage in the property market. In two of these cases the dealings with financial institutions indicated a real limitation on the knowledge and experience of those institutions with environmental markets. One interviewee remarked: '[When we were] looking to purchase another property and spoke with the bank about it and the potential income stream from offsets, the bank officer's eyes just glazed over and it didn't fit the computer model.' In the other instance, it has been, by contrast, the particular relationship and expertise of one officer within the bank that facilitated the landowner's successful entry into environmental market schemes. According to this interviewee, the approach, knowledge and reputation of the particular officer was instrumental in that bank broadening its thinking around agribusiness models to encompass participation in environmental markets. This approach has also created a 'track record' and precedent for participation and financing of these types of schemes. The interviewee noted, however, that it remains a 'major issue' that banks do not understand private land conservation PES and environmental market schemes.

As with other relevant services sectors, professional development and information for services providers (in this case, banks) about the nature and opportunities associated with PES and environmental market schemes is advised, especially to regional branches or those parts of the institutions dealing with rural landowners and agribusiness.

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**Interview results:** No substantive issues were identified in relation to social security implications around market scheme participation by interviewees. Interviewees who remarked on estate planning had generally taken implications of scheme participation issues into account.

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### Recommendation 15

**Engagement with financial institutions and mortgage-providers may be warranted, especially in rural and regional areas, and the professional development of their officers in environmental market opportunities for landowners.**



Threatened Diamond Firetail; photo: C. Tzaros.

## Part 5 Conclusions & Public and Administrative Law – next stages of evolution

Market mechanisms for the delivery and organisation of ecosystem services, including management actions and restoration works, are in their early development stages. While market schemes such as the CFI are slow to attract investor interest without sufficient regulatory impetus, the trend toward paying private landowners for conservation activities (PES schemes) and environmental markets is strong and evolving quickly. This includes payments made to private landowners to protect permanently private land with high conservation values.

Environmental markets and PES schemes are characterised by a diversity of programs, operating over disparate geographic and functional areas, with varying rules, administrative arrangements and timescales. Astute coordination, or greater ‘inter-operability’, of financial and other opportunities for landowners could be beneficial to planning and operation of schemes, including minimising complexity and transaction costs, and optimising transparency, participation and ecological outcomes.

Given the evolving character of these schemes the following observations and suggestions are offered as potential directions for further work and in conclusion to a body of work funded by Victoria’s Legal Services Board.

Suggestions and specific recommendations in this report are offered in the spirit of acknowledging the excellent work done in Victoria to develop innovative approaches to environmental markets. They are intended to assist with the next stage of the evolving Victorian approach.

### 5.1 Toward a ‘best practice’ approach

As the importance of private land conservation, environmental markets and mechanisms to help finance maintenance of ecosystem services grow, the need for clear guidance and best practice tools expands. Development of ‘best practice’ approaches to contractual arrangements for ecosystem services could help guide the use, content and development of environmental market mechanisms in the future. The process of developing a ‘best practice’ approach to the technical and practical aspects of the law could greatly assist key public, non-government and for-profit organisations to learn from good practice, avoid pitfalls and assist with creating common frameworks for environmental market and incentive payment dealings.

From our research and analysis undertaken for this report, we have formed the view that landowners, ‘purchasers’ and intermediaries would benefit from a more coordinated approach to environmental markets and to payments for ecosystem services more generally, and also from examining how they may be more ‘inter-operable’. For instance, development of more transparent arrangements for ‘additionality rules’ could contribute to greater transparency, certainty and fairness in environmental-market dealings and potentially increase the environmental outcomes.

With this in mind, we researched and analysed examples of best practice guides and principles addressing environmental markets and payments for ecosystem services. Useful resources are being developed and international examples include:

- The Business and Biodiversity Offsets Programme (BBOP)<sup>64</sup> is an international collaboration between companies, financial institutions, government agencies and non-government agencies. In 2009 it established 10 Principles to assist business to achieve no net loss or a net gain of biodiversity. BBOP's Standard on Biodiversity Offsets has been further developed over time with best practice Criteria and Indicators added.<sup>65</sup>
- Forest Trends<sup>66</sup> is an international non-profit organisation based in Washington DC, USA, that includes in its work analysis of strategic market and policy issues, and development of new financial tools to help markets work for conservation and people.
- Britain's Department of Environment, Food and Rural Affairs has published 'Payments for Ecosystem Services: A Best Practice Guide' in April 2013, which sets out to provide step-by-step advice on designing and implementing PES schemes. This best practice guide includes coverage of integrating payments for multiple services, bundling, stacking or layering of benefits to be derived from an ecosystem services contract or project. There is also an 'Annex – Case Studies' document from May 2013 that accompanies the guide.<sup>67</sup>

Specific examples of international best practice also exist in particular areas of the law interacting with environmental markets and incentives. For example, the American and Canadian taxation concessions provided to private landowners in exchange for 'gifting' of any part of the value of development rights 'given up' in covenanting land in exchange for payment.<sup>68</sup>

However, our analysis and research has not brought to light any national or international comprehensive best practice guidance specifically addressing the law and private land conservation environmental markets and mechanisms. For this reason, we have developed Draft best practice principles and approaches to the law and environmental markets ('Best Practice Draft Principles and Approaches'). The Best Practice Principles and Approaches are offered to assist policymakers, NRM specialists and conservation organisations discuss and explore the implications of the legal issues identified in this report.

## Recommendation 16

**That Federal and State natural resource management policy decision-makers engage with the public, not-for-profit and private sectors with an interest in private land conservation market mechanisms, to explore potential benefits from arriving at a set of *Best practice principles and approaches to the law, environmental markets and incentive schemes* to assist with governing environmental markets and conservation finance. Further, to assist with this process the accompanying Draft Best Practice Principles and Approaches be considered.**

### *Scheme transparency and objectives*

- **Fair and efficient operation of environmental market schemes operating within a legislative framework would both support their operation and protect landowners' interests in a manner that is proportionate to scale, purposes and interests affected.**
- **Environmental market schemes with clearly established objectives, goals and purposes made available to private landowners and their advisors demonstrate market and incentive schemes transparency.**

- Schemes require clear disclosure of the key legal implications of proposed contractual obligations to prospective participants taking into account the particular nature of the ecosystem services market opportunity.
- Remuneration and prices that are publicly transparent help build confidence in potential scheme participants as would guidance and/or a model for pricing bids when schemes are based on competitive and confidential pricing mechanisms.
- Environmental market schemes should as far as practicable complement rather than undermine cooperative and collaborative land conservation practices across landscapes.

#### *Additionality and integration of schemes*

- Clear and transparent public policy statements about additionality rules and frameworks made available to landholders and practitioners, taking into account the functioning of environmental market schemes and funding opportunities across jurisdictions, will build greater confidence levels in market-based incentive schemes.
- Environmental market and incentive schemes that allow for inter-operability with complementary schemes and programs can facilitate landowners' confidence in managing land for conservation and help leverage multisector investments in private land conservation.

#### *Fairness in contractual terms and dealings*

- Contracts for the delivery of ecosystem services can be characterised as 'relational', 'long-term' contracts, involving both ecological and public interest subject-matter. Contract design taking these characteristics into account, would for instance, focus on how contracts therefore deal with risk and uncertainties; non-performance or disputes resolution; and choice of monitoring, stewardship and compliance frameworks.
- Potential and likely imbalances in transactional power before, at the time of contract establishment and during a contract term, need to be anticipated. Measures to avoid and/or deal with procedural or substantive unfairness should be developed.
- As far as practicable, financing and contractual arrangements for environmental market schemes should accommodate flexibility for landowners and include facility for payments to take account of the social security, taxation and/or commercial considerations of landowners.
- Tax treatment of payments for ecosystem services, including information about tax treatment, should be simplified and made readily accessible for the private landowner.
- Participants in environmental market schemes should be given clear, independent and easily accessible means of recourse in circumstances of dispute or grievance.

#### *Balancing environmental scheme integrity and scheme efficiency*

- Achievement of outcomes intended from an environmental market or incentive scheme should balance consideration of unintended consequences, such as deterring landholder participation, that arise from complexities, inefficiencies and delays in dealings.

### *Continuous improvement*

- **As far as practicable improvements and the future evolution of environmental market and incentive scheme approaches, policies, tools and models (including contracts) should be informed by private landowner perspectives.**

## **5.2 Suite of model contracts and contract clauses**

The development of model contracts and contract clauses has been a feature of some work in relation to international carbon markets. Preparation of model contracts – or contract clauses – could be an equally useful approach in Australia to facilitate market arrangements in delivering ecosystem services. Given the diversity of subject-matter, jurisdiction, works programs and/or landscape in relation to any particular scheme, it may be useful to develop a suite of precedent agreements and/or clauses appropriate to different circumstances or needs. Additionally, commentary could be attached to each for the benefit of both landowners and their advisers, as well as the public and private sector investors.

Agreements, or elements of agreements, may include:

- framework (in-principle) agreements;
- deliverables of multiple ecosystem services outcomes (for example, biodiversity and carbon sequestration);
- ‘boilerplate’ (standard) clauses;
- model management programs for outcomes-based plans or action-based plans;
- draft clauses on significant issues such as indemnities, disputes, variation, default, *force majeure*, extension services, good faith and mistake; and
- contracts for ‘high risk’ ecological assets or processes (for example, habitat of high conservation significance).

## **5.3 Development of guiding policies and protocols**

Beyond model contract or contract clauses, the development of policies, protocols or technical guidance common to environmental market and ecosystem services contracts would be beneficial. This could allow for the fuller and more detailed treatment of certain issues, practices or needs that could not be achieved in the text of the contract itself.

This type of approach has been adopted by central government agencies internationally, such as the US Department of Agriculture (‘USDA’) Office of Environmental Markets within the Chief Economist’s office.<sup>69</sup> At a practical level the USDA Office of Environmental Markets has a program to produce resources for USA states and other localities.

This approach is also being used by non-government organisations such as the Willamette Partnership in America.<sup>70</sup> This multisector partnership develops tools, protocols and guides to help meet its objective

of increasing the pace, scope, and effectiveness of conservation. For the Willamette Partnership it means working with the USDA and other land management stakeholders toward a fair and transparent system for people to buy and sell environmental restoration benefits.

#### 5.4 Integrating environmental market and incentive payments at the landscape scale

Private land tenure in Australia rarely coincides with the structure and management requirements of the natural landscape.<sup>71</sup> Even where natural landscapes have only small areas of remaining remnant vegetation and ecological corridors, the fact that control and management of land is usually spread among many landowners can present a significant constraint on action, due to the coordination and collaboration required. This constraint was noted by interviewee R12 who sought unsuccessfully to get other landowners in her local area involved in a collective approach to a tender program, with a view to each of them contributing to managing and restoring a contiguous area of native vegetation with important conservation values.

In some instances, landscape-scale environmental management can be done at the individual property level if, for example, the property is very large (itself at landscape scale) or if the ecosystem service is not itself inherently connected at a landscape scale (carbon sequestration through land management or plantings might fall into this category). There are other cases of environmental management and restoration where landscape planning and management rely on cooperative solutions and collective management, varying for scale and for ecosystem features.<sup>72</sup> For market and incentive schemes there have been increasing attempts to target delivery of incentives to landscapes, or coherent landscape features (for example, saltmarsh, riparian- or grasslands-based tenders). Strategic approaches to policy setting for offsetting schemes have also had a landscape emphasis, such as under the new native vegetation ‘permitted clearing’ reforms in Victoria, as well as the ‘biobanking’ approach in New South Wales. There tends to be an inherent tension in market-based policies, however, between the need for landscape-scale responses for ecological outcomes and the individualistic dynamics of private property.<sup>73</sup> Legal and policy solutions are needed to facilitate the balance between property and landscape outcomes.

One policy response to the individualising effect of market arrangements may be to revisit the scope of agreement structures available to landowners contemplating participation in market schemes, with a view to encouraging or facilitating collaborative conservation efforts. Victorian tender schemes have ordinarily permitted multiple landowners to participate in the same transaction, but they must do so under a separate, single legal vehicle, such as a company or incorporated association.<sup>74</sup> This adds another layer of management and administration. Consideration may need to be given to legal vehicles facilitating multilateral (many parties) responses to environmental management and restoration needs without the need for additional legal entities.

Our research found an international best practice example of one potential legal solution to adopting a landscape approach accommodating multiple landowners in environmental markets.<sup>75</sup> One of the three wetland mitigation models used in the US regulatory framework allows for non-government, public natural resource management and environmental protection agencies to propose a Watershed Plan of activity and protection across a landscape. Watershed plans need to include detail on selection of land parcels and works to be undertaken. Known as ‘in lieu fee’ wetland mitigation agreements, once approved, they allow fees for mitigation activities and purchasing of ecosystem services from private landowners to be accumulated by the regulator. As agreed with the regulator in the in lieu fee registered agreement, payments for future works can be released to the not-for-profit or public entity once agreed milestones

are reached to the regulator's satisfaction. Such plans may run over many years and land trusts and public sector agencies are able to facilitate private landowner engagement in environmental markets as appropriate across a priority landscape and ecosystem. Consistent with principles of transparency and public interest in relation to environmental regulation, the US Army Corp of Engineers provides an accessible means of tracking and learning from mitigation agreements across the country: RIBITS (Regulatory In-lieu fee and Bank Information Tracking System).<sup>76</sup>

## Recommendation 17

**Consideration of alternate legal arrangements adopted internationally, such as the US Wetland Mitigation Fee In Lieu model facilitating multiple landowner engagement with an environmental market and incentive schemes could improve landscape-scale outcomes.**

## 5.5 Contractual and practical implications of different pricing models

Our report documents how some landowners we interviewed without significant agribusiness pricing experience reported difficulty constructing confidential bids when wanting to participate in 'reverse auction' market-based approaches such as BushTender. Lack of transparency about pricing in any market can affect confidence. It can also compromise understanding of which component of any ecosystem service payment may be treated as capital or income from the perspective of a landowner's taxation affairs and cloud decision-making about the terms upon which they are entering a contract.

A focus on price signals set by landowners has been central to many of the models for conservation tenders to date.<sup>77</sup> If an alternative approach were taken to this aspect of environmental market and incentive contract formation – where competition is not based upon price but on ecological values – a market in the legal sense can still operate because competition, or potential competition, among landowners for funding opportunities would remain. Landscape-based conservation funding under, for example, Federal US Farm Bill funding programs operate in this type of manner,<sup>78</sup> as do elements of the UK Stewardship Payments Program to land managers.<sup>79</sup> Notably, the US Farm Bill approach to funding payments for private landowner provision of public benefit ecosystem services expressly takes into account the complementary benefits of taxation concessions and incentives available to landowners. In both Canada and America these taxation concessions are contingent upon transparent and independently assessed pricing arrangements for programs involving permanent protection of land.

For example, in America the USDA's Natural Resources Conservation Service annually updates a Geographic Area Rate Cap (GARC) to guide payments for ecosystem services and compensation of landowners for permanently protecting land. These GARC values are used for market-based and incentive payment approaches supported by the USDA. GARC values are less than appraised values or values derived from an area-wide market analysis, but are designed to result in compensation for permanent protection of private land that is fair compensation for the rights being acquired through the permanent protection instrument and in some cases 30-year contracts. The land types used in the GARC determinations are

- irrigated cropland (including sub-irrigated);
- non-irrigated cropland;

- pastureland/hayland;
- forestland; and
- rangeland.<sup>80</sup>

A recent review of funding to private land conservation in Victoria's Goulburn Broken catchment<sup>81</sup> dealt with precisely this comparison of 'tender' and 'fixed-rate' delivery models and tends to support the notion of a modified environmental market approach. The review concluded that the fixed-rate (fixed price) approach was preferable overall (especially for short-term public conservation projects with limited funding):

In conclusion, from this initial comparison, fixed-rate sites offered similar value for money, were on average larger, of similar quality and better connected in the landscape compared to successful tender sites.<sup>82</sup>

## Recommendation 18

**That land management public policy decision-makers consider the potential benefits of providing accessible and transparent pricing valuations and guidance, as well as the benefits and trade-offs of competitive bidding as against fixed pricing funding models.**

## 5.6 Tax treatment of environmental market scheme payments

Several policy issues confront the tax treatment of payments received by landowners under environmental market and incentive schemes. The complexity of tax treatment for private land conservation has already been noted in this report. To some degree that complexity is unavoidable, for instance where revenue law across jurisdictions applies: not only Commonwealth income tax or GST may apply, but also State land tax and municipal rates.

### 5.6.1 Clarifying tax treatment of expenditures for nature conservation purposes<sup>83</sup>

Under Commonwealth income tax law, benefits only applying to primary producers are relaxed through deductions for 'landcare operations'. Capital expenditure for landcare operations is deductible. This category of deduction is available to rural landowners using their land to carry on a business for a 'taxable purpose',<sup>84</sup> as well as to those using the land for primary production. Taxable purpose includes for 'the purpose of producing assessable income',<sup>85</sup> which, depending on a landowner's individual financial and taxation circumstances, may include income from environmental market schemes and incentives.

Whether activities funded under environmental market programs and agreements are 'landcare operations' is a key question. The concept of 'landcare operations' turns on actions to combat 'land degradation'.<sup>86</sup> These actions include fencing to control pest species,<sup>87</sup> salinity control measures,<sup>88</sup> other actions to control invasive species,<sup>89</sup> and other actions 'primarily and principally for the purpose of... preventing or fighting land degradation...'.<sup>90</sup> There is not necessarily a clear and unambiguous correlation between 'land degradation' prevention and an environmental management and restoration program undertaken solely for nature conservation purposes. Amelioration of land degradation has tended to refer to actions aimed at combatting deterioration in productive qualities of the land (that is, especially its agricultural qualities),

rather than improvement of the ecological processes and features of land.<sup>91</sup> A formal interpretation of land degradation and the *Income Tax Assessment Act 1997*, ss 40.630-40.640, appears yet to occur, in case law or ATO interpretation, in respect of private land conservation funding programs occurring primarily or solely for ecological purposes. ATO interpretation does indicate that the deduction is available for expenditures to ameliorate land degradation, notably through revegetation, that also incidentally sequesters carbon and from which income from carbon sequestration rights is generated.<sup>92</sup> But this is distinct from capital expenditures made for the principal or sole object of nature conservation and maintenance of ecological function.

Provisions for 'landcare operations' capital deductions pre-date widespread use of financial incentives and market mechanisms for delivery of ecological management and restoration of private land.<sup>93</sup> It therefore appears timely and appropriate to revisit the structure and content of these capital allowances to adjust the meaning of 'landcare operations'. Adjustments could include:

- shifting the language of these provisions toward 'ecological management and restoration' activities (or alternatively the 'management and restoration of ecosystem goods and services'), as distinct from 'landcare operations'; and
- establishing, as appropriate, the purposes of actions enumerated in section 40.635 as 'ecological management and restoration' (or alternatively the 'management and restoration of ecosystem goods and services'), as distinct from ameliorating land degradation.

## Recommendation 19

**Reviewing the purposes and contemporary usefulness of the 'landcare operations' concessions under the *Income Tax Assessment Act 1997* could result in increasing private investment in sustainable land management practices to the benefit of Australia and public sector environmental sustainability programs.**

### 5.6.2 A stand-alone architecture for 'ecosystem services' payments

Under Commonwealth tax law, relevant provisions are outlined in legislation, including income tax legislation and GST legislation. Tax provisions relating to carbon offsetting measures are distinctly contained in a stand-alone architecture under Part 3-50 of the *Income Tax Assessment Act 1997*. This approach provides an element of coherence and relative simplicity to the tax treatment of carbon offsetting. There would be value in a similar stand-alone, coherent treatment of revenues from the management of 'ecosystem services' as a category of economic activity. It is a category that might incorporate activities such as participation in conservation tenders, environmental offsets and grant programs with a view to creating a unified scheme for this sector of the land management activities.

## Recommendation 20

**ATO consideration of stand-alone treatment of revenues from the management of 'ecosystem services' as a category of economic activity could support the overall governance of environmental markets and enhance public sector funding programs' ability to leverage private investment in conservation.**

### 5.6.3 Recognising the public interest character of ecosystem services payments

Various tax incentives currently exist for landowners who engage in private land conservation initiatives. These include deductions or concessions for landcare operations<sup>94</sup>, and income tax deductions and concessional capital gains tax treatment for entering into conservation covenants or other ATO-recognised permanent protection instrument registered on title.<sup>95</sup> These measures are intended to provide tax benefits and incentives to land-based environmental activities, but they do so in a limited manner. For instance, deductibility against taxable income for entering into a conservation covenant only applies where land value declines by more than \$5000 (independently assessed by an ATO valuer) as a result and where no consideration is received for doing so. In the case of a landowner voluntarily entering into a covenant as an element of their market-based or incentive scheme participation (such as in the case of some National Landcare Program projects and regulatory native vegetation offsets), the income tax deduction is not available because consideration (in the form of money payments) will be received for doing so, however, landowners may have some eligibility for concessional Capital Gains Tax treatment.

Focusing upon the eligible deductions against taxable income, it appears that by comparison with international best practice, tax policy fails to acknowledge public interest dimensions to these transactions, even though it is reasonable to assume both private and public interest characteristics to them.<sup>96</sup> The public interest character of entering into permanent protection registered on title is only addressed under these provisions where covenanting occurs entirely as a gift.

The establishment of 'split-receipting' for charitable 'ecological gifts' in jurisdictions such as Canada<sup>97</sup> has been one important method of recognising and accommodating the public interest character of environmentally beneficial transactions.<sup>98</sup> In summary, a landowner can receive a payment or incentive for permanently protecting environmentally sensitive land and at the same time receive a tax deduction spread over five years for any unremunerated value of the 'land use and development rights' effectively given up (gifted) in establishing permanent protection. This tax law framework enables the Canadian funding mechanism supporting on-title protection of high conservation value land to complement and work proactively with the tax law incentives for landowners donating ecologically sensitive lands to a qualified land trust. This approach also operates in the United States.

The policy basis of the Canadian approach is to allow for the private benefit of money or property received for entering into conservation protection to be distinguished from the 'charitable' (public) benefit of encumbering the land for conservation purposes and reducing its fair market value.<sup>99</sup>

The question of 'fair market value' is significant in determination of tax benefits and liabilities under this approach. 'Market value' will accord with a probable value attaching to the highest and best use of the land. This may not be its present use (for example, 'highest and best use' may be the use of the land for development). In respect of ecological gifts, such as the transfer of property interests to another party for environmental purposes, fair market value may include calculation of foregone use or development rights as these are represented in that valuation. Similar valuation rules operate under Australian tax law.<sup>100</sup>

The tax treatment in the Canadian approach better acknowledges and deals with the private/public benefit distinction actually operating in environmental incentive and market schemes. Taking the lead from international best practice in this regard could help evolve the Australian tax law to take better account of emerging environmental markets and incentive payments. Reforms may help avoid what one interviewee described as the end result of a regulatory-related native vegetation offset transaction they were involved in: 'tax-wise it was an absolute disaster.' It was to the bemusement of a number of interviewees that the

public benefits of preserving the land in perpetuity for environmental benefits could not be adequately recognised in the tax outcomes for landowners.

### Recommendation 21

Canadian (and American) approaches to the tax treatment of ecosystem services payments that seek to clarify and distinguish private and public interest dimensions to revenues, as well as allowing for ecological ‘gifting’, could substantially benefit Australia’s ecosystem service protection efforts, and enable a greater level of transparency, fairness and landowner confidence in environmental contracts.



Nesting habitat replacements for threatened Powerful Owls in an area where large tree hollows are in short supply; photo: K. Hutchison, Trust for Nature.

## Part 6 Useful Resources

### 6.1 Australia

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 information sheets on environmental markets and the law, <http://www.trustfornature.org.au>

Norton Rose Fulbright *CFI Legal and Contracts Guide* (2013), <http://www.daff.gov.au/climatechange/cfi>

Department of the Environment *Gifts that keep on giving: a landholder's guide to land protection and conservation options*, <http://www.environment.gov.au/resource/gifts-keep-giving>

Department of Environment and Primary Industries '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)

### 6.2 International

American Farmland Trust's *Guide to Environmental Markets for Farmers & Ranchers*: <http://www.farmland.org/documents/GuidetoEnvironmentalMarketsforFarmersandRanchers.pdf>

Department for the Environment, Food and Rural Affairs *Payments for Ecosystem Services: A Best Practice Guide* (2013), <http://www.cbd.int/financial/pes/unitedkingdom-bestpractice.pdf>

Department for the Environment, Food and Rural Affairs *The New Common Agricultural Policy Schemes in England: August 2014 Update* <http://www.fwi.co.uk/assets/getasset.aspx?itemid=7309257>

Ecological Gifts Program, Environment Canada: <http://www.ec.gc.ca/pde-egg>

Business and Biodiversity Offsets Programme <http://bbop.forest-trends.org/index.php>

The CERSPA Initiative *Certified Emission Reductions Sale and Purchase Agreement (CERSPA template)*, <http://cerspa.com/>

Ecosystem Marketplace <http://www.ecosystemmarketplace.com/>

US Land Trust Alliance website [www.landtrustalliance.org/policy](http://www.landtrustalliance.org/policy); <http://www.landtrustalliance.org/land-trusts/wetland-and-stream-mitigation-a-handbook-for-land-trusts>

USDA Office of Environmental Markets Website: [http://www.usda.gov/oce/environmental\\_markets/index.htm](http://www.usda.gov/oce/environmental_markets/index.htm)

USDA Natural resources conservation service, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/>

Willamette Partnership <http://willamettepartnership.org/>

### 6.3 Taxation

ATO Information for Primary Producers, <https://www.ato.gov.au/Forms/Information-for-primary-producers-2014/>

Ann Hillyer and Judy Atkins *Giving it away: tax implications of gifts to protect private land* (West Coast Environmental Law Research Foundation, 2004), <http://wcel.org/resources/publication/giving-it-away-tax-implications-gifts-protect-private-land-0>

## Part 7 Glossary

*ACCUs*: Australian Carbon Credit Units, a form of registered credit accounting for an amount of carbon emissions sequestered or carbon emissions avoided.

*Adaptive management*: the iterative process of improving and developing environmental management by way of systematic review of, and learning from, implemented practices and policies.

*Additionality*: the requirement that an intended conservation benefit be in excess of (in addition to) any existing environmental obligations established by law or agreement.

*Biodiversity*: the variability among living organisms from all sources, including diversity within and between species and diversity of ecosystems.

*Bundling of ecosystem services*: in environmental market transactions, the merging of multiple types of ecosystem services under a single credit form or arrangement.

*BushBroker*: a Victorian Government facility established as an intermediary between permit holders and offset providers, facilitating and managing transactions between the two under native vegetation clearing controls operating under the state's planning system.

*BushTender*: the auction-based mechanism used by the Victorian Government to deliver funding for biodiversity conservation on private land. It has other parallel tender schemes, such as EcoTender, Wetland Tender, and comparable arrangements delivered for instance by CMAs.

*Carbon sequestration*: the natural process of carbon dioxide being absorbed from the atmosphere and metabolised by plants.

*CFI*: the Commonwealth Government's Carbon Farming Initiative, established as part of the Clean Energy Package.

*Contract*: an agreement or promise struck between parties recognised and enforceable at law.

*Covenant*: an agreement to do or (more commonly) restrain from doing certain actions or activities on or in relation to land and which 'runs with the land', that is, functions as a proprietary interest in affected land. Covenants may be restrictive (restrain a landowner from doing something) or positive (compel them to do something). They may be established at common law or under statute (for example, conservation covenants under the Victorian Conservation Trust Act 1972).

*Environmental markets*: market (transactional) arrangements and practices operating in relation to the delivery of conservation benefits and outcomes, in particular on private landholdings. DEPI have trademarked the word 'ecoMarkets' to refer to such schemes it may promote and design.

*Ecosystem services*: the 'flow' of benefits derived by humans from the 'stock' of ecosystem functions and properties.

*Habitat hectare*: A site based measure of quality and quantity of native vegetation that is assessed in the context of the relevant native vegetation type.

*Habitat score:* The score assigned to a habitat zone that indicates the quality of the vegetation relative to the Ecological Vegetation Class (EVC) benchmark – sum of the site condition score and landscape context score, usually expressed as a percentage or on a scale of zero to 1.

*Mixed income land managers:* rural landowner on smaller landholdings for which a primary reason for landownership is amenity or conservation values and for whom income does not primarily derive from traditional farming operations.

*Monopsony:* market arrangement characterised by a single buyer and multiples sellers.

*Native vegetation:* in Victoria, plants indigenous to the state.

*Native vegetation clearing controls:* the body of statutory and administrative rules, policies and provisions restricting and directing the capacity of landholders to remove or destroy native vegetation. In Victoria, these operate under the planning system.

*Offsets:* compensatory actions taken to secure, maintain and/or enhance ecosystem functioning and properties subsequent approvals to remove, damage, compromise or destroy ecosystem services elsewhere (for example wetlands, biodiversity, vegetation, carbon stabilisation).

*On-title:* attachment of rights, obligations or restrictions to land by way of inclusion in the proprietary (Torrens) title attached to a land parcel(s).

*Personal property:* property interests other than real property (land) interests, for example physical assets, excludable and transferable rights.

*PES:* payments for ecosystem services.

*Public sector investment:* funding made available by Government or public authorities derived from public appropriations.

*Regulation:* generally, prescriptive statutory rules but occasionally used to mean rules issued by Government or public agencies more widely (that is, including non-statutory rules). More precisely, delegated legislation or statutory rules.

*Reverse auction:* a system of market bidding based on the provision of competitive offers from (multiple) sellers, as distinct from bidding by multiple/competitive buyers.

*Riparian:* relating to a river or waterway.

*Stacking of ecosystem services:* in relation to ecosystem services, the accumulation of multiple ecosystem services from a single property for sale or credit under various environmental market schemes or payment opportunities.

*Statutory planning:* the administrative dimension of land use and development planning, especially through the assessment and approval of proposals under planning schemes, typically undertaken by local government.

*Strategic planning:* land use and development decision-making at scales larger than individual proposals or projects, which usually requires amendment to planning schemes and comprises a (subordinate) legislative process. Strategic planning may occur on a local or regional level.

*Strategic assessment:* for the purposes of the EPBC Act, a process of evaluation of environmental impacts across multiple impacts or projects, especially at a landscape scale. Strategic assessments under the Act can relate to a policy, plan or program.

*Take-it-or-leave-it contract:* a standard form of contract around which there occurs little or no negotiations. Usually, a form of agreement around which there are significant imbalances in negotiating power as between the parties.

*Transaction:* an exchange or dealing.

*Trust for Nature (TfN):* statutory conservation body established under the Victorian Conservation Trust Act 1972.

## Endnotes

- 1 For comprehensive and wide-ranging work on environmental market schemes and 'payment for ecosystem services' schemes, see <http://www.ecosystemmarketplace.com/> (30 May 2014), including that site's various State of Forest Carbon Markets and State of Biodiversity Markets reports.
- 2 <http://www.trustfornature.org.au/data/media/00002011/Web2-Land-based-environmental-markets-and-the-law.pdf> (30 May 2014).
- 3 <http://www.trustfornature.org.au/data/media/00002011/Web2-Land-based-environmental-markets-and-the-law.pdf> (30 May 2014).
- 4 For instance, the Heredia Declaration on Payments for Ecosystem Services: see Joshua Farley and Robert Costanza 'Payments for ecosystem services: from local to global' (2010) 69 *Ecological Economics* 11 2060; Department for the Environment, Food and Rural Affairs *Payments for Ecosystem Services: A Best Practice Guide* (2013), <http://www.cbd.int/financial/pes/unitedkingdom-bestpractice.pdf> (accessed 10 July 2014)
- 5 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, [187]. Competition, in principle, may occur otherwise than on the basis of price signals: *Competition and Consumer Act 2010* (Cth), s 4E.
- 6 For example, Allan Curtis and Marike Van Nouhuys 'Landcare participation in Australia: the volunteer perspective' (1999) 7 *Sustainable Development* 98; Allan Curtis 'Landcare: approaching the limits of voluntary action' (2000) 7 *Australasian Journal of Environmental Management* 1 19.
- 7 For example, Romy Greiner 'Social dimensions of market-based instruments: introduction' (2013) 31 *Land Use Policy* 1 [editorial introduction of a Special Issue on the theme]; R Tennent and S Lockie 'Market-based instruments and competitive stewardship funding for biodiversity conservation: the achievable reality' (2013) 20 *Australasian Journal of Environmental Management* 1 6; Katie Moon 'Conditional and resistant non-participation in market-based land management program in Queensland, Australia' (2013) 31 *Land Use Policy* 17; Louise Blackmore and Graeme Doole 'Drivers of landholder participation in tender programs for Australian biodiversity conservation' (2013) 33 *Environmental Science and Policy* 143.
- 8 For example, Sacha Jellinek, Kirsten Parris, Don Driscoll and Peter Dwyer 'Are incentive programs working? Landowner attitudes to ecological restoration of agricultural landscapes' (2013) 127 *Journal of Environmental Management* 69; van Ingrid Putten, Sarah Jennings, Jordan Louviere and Leonie Burgess 'Tasmanian landowner preferences for conservation incentive programs: a latent class approach' (2011) 92 *Journal of Environmental Management* 2647.
- 9 Melissa Haw, Chris Cocklin and David Mercer 'A pinch of salt: landowner perception and adjustment to the salinity hazard in Victoria, Australia' (2000) 16 *Journal of Rural Studies* 155.
- 10 For example, CSIRO and Wimmera CMA *Landholder experiences with the Wimmera Tender programs: summary results* (2013); Gary Stoneham, Vivek Chaudri, Arthur Ha and Loris Strappazzon 'Auctions for conservation contracts: an empirical examination of Victoria's BushTender trial' (2003) 47 *Australian Journal of Agricultural and Resource Economics* 4 477; North East CMA *A comparative evaluation of the effectiveness of River Tender* (2008); Ann Buchan *VVP Plains Tender: investing in biodiversity on the Victorian Volcanic Plains* (Corangamite CMA, 2006).
- 11 D Race, A Curtis and R Sample 'Restoring the bush on private land: perspectives of landholders in Victoria' (2012) 19 *Australasian Journal of Environmental Management* 4 227, 228.
- 12 For example, Stoneham, et al 'Auctions for conservation contracts: an empirical examination of Victoria's BushTender trial'. This study emphasises the significant function of 'information revelation', as an economic disclosure process, in the process of management of natural resources (in this particular case, the revelation of economically useful information in the allocation of conservation contracts).
- 13 In one case, the interviewee was effectively an agent of the landowner. The interviewee was project manager for delivery of the conservation program on the land at issue.
- 14 The term 'mixed income land manager' is used to designate those rural landowners on smaller landholdings and for which a primary reason for rural landownership is amenity or conservation values, with engagement in some forms of primary

- production occurring (tends to be small-scale ) and off-property income typically the main income source: see for example Neil Argent, Peter Smalles and Trevor Griffen 'The amenity complex: toward a framework for analyzing and predicting the emergence of a multifunctional countryside in Australia' (2007) 45 *Geographical Research* 3 217
- 15 See also R17: 'At the end of the day I'm an environmentalist. I'm also a very pragmatic person. I have an interest in surviving on the land. I'm into sustainable farming. It all ties together. That's what we do. We're into sustainability on the land. It was just a natural progression for us, as you become more informed about things. Initially it was just part of the sustainability side of things, but with the offset that's more about income provision. In fact it's given us the vehicle to secure large amounts of money to acquire more property and include that into our sustainable program. Properties we have bought as part of the scheme have very sensitive bushland. It is also farming land.'
- 16 See also section 2.5 below
- 17 See for example Charlie Zammit 'Landowners and conservation markets: social benefits from two Australian government programs' (2013) 31 *Land Use Policy* 11; Louise Blackmore and Graeme Doole 'Drivers of landholder participation in tender programs for Australian biodiversity conservation' (2013) 33 *Environmental Science and Policy* 143.
- 18 The term 'communities of practice' has developed in the context of studies on learning and education, especially informal, shared or semi-structure learning. Other terms include 'social learning'. There is an extensive and useful literature on social learning process among farmers and other landowners, in Australia and overseas. See for example: Sue Oreszczyn, Andy Lane and Susan Carr 'The role of networks of practice and webs of influencers on farmers' engagement with and learning about agriculture innovations' (2010) 26 *Journal of Rural Studies* 4 404 (a UK example); Chris Harrington, Allan Curtis and Rosemary Black 'Locating communities in natural resources management' (2008) 10 *Journal of Environmental Policy and Planning* 2 199 (a broad-based study of community theory in NRM); J Millar and A Curtis 'Moving farmer knowledge beyond the farm gate: an Australian study of farmer knowledge in group learning' (1997) 4 *European Journal of Agricultural Education and Extension* 2 133.
- 19 Richard Speidel 'The characteristics and challenges of relational contracts' (2000) 94 *Northwestern University Law Review* 3 823. Relational contract theory owes its origins in particular to Professor Ian Macneil: see Ian Macneil 'Contracts: adjustment of long-term economic relations under classical, neoclassical and relational contract law' (1977) 72 *Northwestern University Law Review* 6 854
- 20 Slayde Hawkins, Michelle Nowlin, Daniel Ribeiro, Ryan Stoa, Ryke Longest and Jim Salzman *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement* (Katoomba Group, 2010), 23.
- 21 On the subject of long-term contracts generally, see Kanaga Dharmananda and Leon Firios (eds) *Long-term contracts* (Federation Press, 2013)
- 22 See John Kelly 'Practical guidelines for the drafting of long-term contracts' in Kanaga Dharmananda and Leon Firios (eds) *Long-term contracts* (Federation Press, 2013), 83-110.
- 23 Ibid; see also Graham Haines' useful, slim volume *The Manager's Guide to Supply Contracts and Tenders for Products and Services* (The Business Library, 1991).
- 24 This is a precedent document.
- 25 Friedrich Kessler 'Contracts of adhesion – some thoughts on freedom of contract' (1943) 43 *Columbia Law Review* 629; Andrew Robertson 'The limits of voluntariness in contract' (2005) 29 *Melbourne University Law Review* 179.
- 26 This so-called 'substantive unfairness' of contract terms is now regulated and reviewable for consumer contracts under the Australian Consumer Law: see generally Jeannie Patterson 'The Australian unfair contract terms law: the rise of substantive unfairness as a ground of review of standard form consumer contracts' (2009) 33 *Melbourne University Law Review* 3 934.
- 27 See for example Gareth Lennox, Kevin Gaston, Svetlana Acs, Martin Dallimer, Nick Hanley, and Paul Armsworth 'Conservation when landowners have bargaining power: continuous conservation investments and cost uncertainty' (2013) 93 *Ecological Economics* 69. Structural circumstances in which 'supplier' or 'seller' power in the market may occur in the Australian context is where Crown land is used to supply environmental offsets, as for example occurs under the Victorian native vegetation offsets scheme. It is intended that Crown land supply for these purposes will be put in legislative form: *Native Vegetation Credit Market Bill 2014* (Vic), Part 3.
- 28 See generally Department of Environment and Primary Industries '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) (viewed 6 April 2014).

- 29 Interviewee R17 remarked that the process should include ‘some indicative numbers, as to what range they [agency] expected bids to come in to’. The landowner continued: ‘I tender for a lot of stuff. You always get an indicative range.’ This interviewee had considerable involvement in the NRM industry as a contractor, as well as in the capacity of landowner. His view was that the bid process in this respect was generally inadequate.
- 30 R17 identifies the paramount importance of management planning, especially upfront site preparation and planning (where revegetation included), over the whole contracted cycle. This was not necessarily the basis on which landowners were induced to bid.
- 31 R14 noted the need for ‘basic training on how to price a bid... so everyone’s skill level is at the same level.’ A key gap was viewed to be skills in bid preparation for tenders in this field: ‘The best projects, regardless of funding source, were the ones carried out with a lot of experience with NRM-type activities. [The worst] bids were ones [carried out] by inexperienced practitioners.’
- 32 See discussion on ‘mistakes’ below in section 3.2.3.5.
- 33 See for example R13: ‘Q: Dealings with the [agency] went awry, you mentioned. Were those contacts more in the nature of policing the agreement rather than educating yourselves? A: Yes, they were. Very much on the agreement. We had to comply. There wasn’t a lot of support in that respect. I dropped everything to do the audits [when they were due]. You never knew when [the audits] were going to come...’
- 34 Hawkins, et al *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement*, 13.
- 35 See for example The CERSPA Initiative *Certified Emission Reductions Sale and Purchase Agreement (CERSPA template), version 2.0*, 2009, cl 10.03-10.04, <http://cerspa.com/> (viewed 11 April 2014).
- 36 See J W Carter, Kate Cahill and Kate Draper ‘Force majeure clauses – a timely topic’ (2011) 26 *Australian Environment Review* 3 74; also Donald Robertson ‘Force majeure clauses’ (2009) 25 *Journal of Contract Law* 1 62.63: ‘The purpose of force majeure clauses is to keep the contract alive despite significantly disrupting supervening events... This risk necessarily requires each party to trust the other as the consequences of the event and the contractual suspension work themselves out.’
- 37 Carter, et al ‘Force majeure clauses – a timely topic’ (2011) 26 *Australian Environment Review* 3 74.
- 38 See generally Thompson Reuters *Laws of Australia* (at 1 June 2012) ‘2 Vitiating Factors’, [7.2.470]-[7.2.760].
- 39 See generally, Thompson Reuters *Laws of Australia* (at 15 July 2012) 7 *Contract: General Principles*, ‘3 Variation’, [7.4.740].
- 40 N C Seddon and M P Ellinghaus *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> ed, LexisNexis Butterworths, 2002), [22.3]: ‘If the new terms are so far inconsistent with the original contract as to destroy its substance, it can be inferred that the parties intended to abrogate it and replace it with a new and independent contract.’
- 41 See for example Robin Kundis Craig and J B Ruhl ‘Designing administrative law for adaptive management’ (2014) 67 *Vanderbilt Law Review* 1 1; see also Jesse Richardson Jnr ‘Conservation easements and adaptive management’ (2010) 3 *Sea Grant Law and Policy Journal* 1 31.
- 42 They would not ordinarily be challenges to a statutory decision-maker sourced in public law (for instance, a challenge to a permit or license). That is a challenge may be to a statutory actor, such as a government official contracting with a landowner.
- 43 For a complaint to be handled by the Victorian Ombudsman, it would have to fall within the definition of an ‘administrative action’: *Ombudsman Act 1973* (Vic), s 2. Given this term has been interpreted broadly, as encompassing actions of executive government: *Glenister v Dillon* [1976] VR 550; *Booth v Dillon (No 3)* [1977] VR 143, government agencies or statutory bodies entering into these agreements in exercise of their powers and responsibilities would be amenable to investigation by the Ombudsman in appropriate circumstances.
- 44 See for example Institute of Arbitrators and Mediators Australia *Expert Determination Rules*, <https://www.iama.org.au/resources/expert-determination-rules> (5 May 2014). See also *The Heart Research Institute v Psiron Ltd* [2002] NSWSC 646, [16]: ‘Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind’. Also *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC135.
- 45 Compare the remarks of French CJ, Crennan and Kiefel JJ in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38, [25].
- 46 *Commercial Arbitration Act 2011* (Vic). The Act has wide application as to what is ‘commercial’: see section 1 of the Act, as

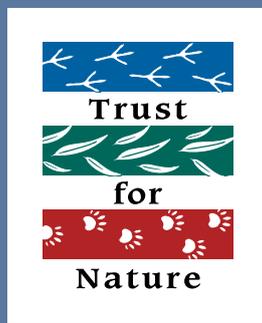
well as to what falls under the concept of an ‘arbitration agreement’, which gives the Act effect over these types of dispute resolution mechanisms: see Part 2 of the Act.

- 47 See eg *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784; *Gramotnev v Queensland University of Technology* [2013] QSC 158; *McDonald v State of South Australia* [2008] SASC 134. Note the remark by Anderson J in *McDonald v State of South Australia* [2008] SASC 134, [319], arguably apposite to this discussion: ‘The tests for construction of a contract of employment are the same as for any other type of contract. The contract should be interpreted in a way that enables each party to know what their obligations are so that in turn the other party may benefit from the contract.’
- 48 See *Goldman Sachs J B Were Services Pty Ltd v Nikolich* [2006] FCAFC 120, [29]-[30] per Black CJ
- 49 In which case, it may be that ambiguities are to be interpreted against the stronger party: compare Seddon and Ellinghaus *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Aus ed, LexisNexis Butterworths), [10.33]
- 50 Trust for Nature and Victoria Naturally Alliance workshop for key NRM and legal stakeholders: 26 May 2014.
- 51 For example, interviewee R12: ‘I think there is an underestimation generally in the effort involved in keeping properties in good condition. There is the assumption that you’ve got the bush and you’ve got to do something more, but you may already be doing the maximum capacity of what you can do, and that’s just not recognised as an input. I think there is work to do in realising what it means to keep something in good condition. Not just planting more trees. What’s good management. What’s involved in that... It’s a labour of love. Big blokey stuff tends to be recognised but smaller-scale labour intensive efforts are very important [for example hand weeding, bringing back ground covers, allowing natural regeneration]. A lot of really careful restoration work requires time, effort and consistency.’
- 52 Catchment and Land Protection Act 1994 (Vic), s 20.
- 53 ‘Reasonableness’ in these circumstances (stewardship funding) might be said to extend simultaneously to the statutory obligations operating under the *Catchment and Land Protection Act*, s 20, in which general stewardship duties are expressed in terms of the obligation on landowners to take ‘reasonable steps’ to look after the land.
- 54 This interviewee, as well as R1, remarked on propensities for landowners to abstain from putting on-title protections over land and contributing to degradation of environmental values or to land-use change.
- 55 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), subs 41(1), 41(4A); Carbon Credits Carbon Farming Initiative Regulations, reg 3.29(1)(a). This assumes that the offset project is on the ‘positive list’ of the types of projects that are additional to ‘common practice’: see Norton Rose Fulbright *CFI Legal and Contracts Guide* (2013), [2.3] and Table 2.4.
- 56 Sarah Bekessy and Brendan Wintle ‘Using carbon investment to grow the biodiversity bank’ (2008) 22 *Conservation Biology* 3 510; Sarah Bekessy, Brendan Wintle, David Lindenmayer, Mark McCarthy, Mark Colyvan, Mark Brugman and Hugh Possingham ‘The biodiversity bank cannot be a lending bank’ (2010) 3 *Conservation Letters* 3 151.
- 57 On stacking, see for example World Resources Institute *How Can Conservation Programs Effectively Interact with Environmental Markets* (Office of Environmental Markets, USDA, 2013), [http://www.usda.gov/oce/environmental\\_markets/files/WRI\\_Conservation%20Programs%20and%20Env%20%20Markets.pdf](http://www.usda.gov/oce/environmental_markets/files/WRI_Conservation%20Programs%20and%20Env%20%20Markets.pdf) (retrieved 13 June 2014).
- 58 On bundling and stacking environmental credits, see Robert Deal, Bobby Cochran and Gina LaRocca ‘Bundling of ecosystem services to increase forestland value and enhance sustainable forest management’ (2012) 17 *Forest Policy and Economics* 69. <http://willamettepartnership.org/ongoing-projects-and-activities/nrcs-conservation-innovations-grant-1/counting-on-the-environment> (viewed 4 April 2014).
- 59 Deal, et al ‘Bundling of ecosystem services to increase forestland value and enhance sustainable forest management’ (2012) 17 *Forest Policy and Economics* 74.
- 60 Deal, et al ‘Bundling of ecosystem services to increase forestland value and enhance sustainable forest management’ (2012) 17 *Forest Policy and Economics* 73
- 61 See Elizabeth Marshall and Marca Weingerg Baselines in environmental markets: tradeoffs between cost and additionality (Economic Brief 18, USDA, 2012), <http://www.ers.usda.gov/publications/eb-economic-brief/eb18.aspx> (retrieved 13 June 2014).
- 62 ‘Primary production business’ is the key term under which landowner activities will be classified for tax purposes, as defined under *Income Tax Assessment Act 1997* (Cth), s 995.1.
- 63 [http://bbop.forest-trends.org/pages/advisory\\_group](http://bbop.forest-trends.org/pages/advisory_group) (13 July 2014)
- 64 Forest Trends and Wildlife Conservation Society provide the Secretariat for BBOP.
- 65

- 66 <http://www.forest-trends.org/> (13 July 2014)
- 67 A useful analysis of costs and feasibility of public sector grant programs, incentives and market-based approaches being effectively complemented by private sector PES /payments for ecosystem services, was undertaken by Natural England for the British Department of Environment, Food and Rural Affairs to assist with British Government's response to the seven-year review of the European Union Central Agricultural Policy (CAP) Sustainable Environment stream: Farming and Biodiversity (July 2012). This report concluded that private sector PES schemes were unlikely to make a significant contribution to British high-priority protection and restoration goals up to 2020.
- 68 Refer to section 5.5.3 for more details.
- 69 The USDA Office of Environmental Markets describes its aims in the following way:  
 ... to facilitate interagency coordination on the topic of ecosystem services and markets while also ensuring collaboration with other entities... A real concern associated with the emergence of ecosystem markets and the enthusiasm surrounding them is that many players will start entering the game and make separate rules for each market. The Office of Environmental Markets (has a) critical role as facilitating interagency consultation and leveraging expertise across government to ensure consistency in standards and protocol development and to move toward a unified system for registration and verification to help the government operate as one... The agency will likely make recommendations and offer consistent guidelines as some of the bigger policy issues get tested on the ground. Overall, the creation of this agency represents a commitment by the federal government to develop market-based opportunities for landowners and learn from existing efforts in this field while helping to organize these efforts to create efficiencies.
- 70 See for example Willamette Partnership 'Protocols, tools and templates' <http://willamettepartnership.org/tools-templates> (2 June 2014).
- 71 Public land management has sought, to a degree, to absorb landscape-scale land management issues into tenure arrangements, such as through national parks and public reserves. Other measures, such as planning schemes, also endeavour to respond to landscape-scale environmental management through statutory controls.
- 72 Compare Heidi Stallman 'Ecosystem services in agriculture: determining suitability for provision by collective management' (2011) 71 *Ecological Economics* 131.
- 73 Kristen Williams, Andrew Reeson, Michael Drielsma and Jamie Love 'Optimised whole-landscape ecological metrics for effective delivery of connectivity-focused conservation incentive payments' (2012) 81 *Ecological Economics* 48.
- 74 DSE *Ecomarkets: EcoTender and BushTender: Information Sheet* (2008).
- 75 In-person discussions by Fiona Smith, Policy Advisor to the report, as Churchill Fellow travelling in USA, September & October 2013 with Jessica Wilkinson, Senior Policy Advisor, Mitigation, The Nature Conservancy world office and USDA Office of Environmental Markets in Washington, DC.
- 76 <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/techbio.aspx> (13 July 2014)
- 77 See for example Jill Windle and John Rolfe 'Exploring the efficiencies of using competitive tenders over fixed price grants to protect biodiversity in Australia's rangelands' (2008) 25 *Land Use Policy* 3 388.
- 78 See for example Aimee Weldon *Conserving Habitat Through the Federal Farm Bill: A Guide for Land Trusts and Landowners* (Defenders of Wildlife, 2010), [http://www.defenders.org/publications/conserving\\_habitat\\_through\\_the\\_federal\\_farm\\_bill.pdf](http://www.defenders.org/publications/conserving_habitat_through_the_federal_farm_bill.pdf) (4 May 2014).
- 79 <http://www.naturalengland.org.uk/ourwork/farming/funding/es/> (4 May 2014).
- 80 <http://www.nrcs.usda.gov/wps/portal/nrcs/site/nh/home/> (13 July 2014)
- 81 Jacqui Slingo *Threatened Grassy Woodlands in the Goulburn Broken Catchment 2010-2013* (Victorian Department of Environment and Primary Industries, 2014).
- 82 Jacqui Slingo *Threatened Grassy Woodlands in the Goulburn Broken Catchment 2010-2013* (Victorian Department of Environment and Primary Industries, 2014), 15.
- 83 The author is grateful for comments from the project evaluator relating to the issues raised in this sub-section. Any errors or omissions remain the sole responsibility of the author.
- 84 *Income Tax Assessment Act 1997* ('ITAA 1997'), subs 40.630(1)(b).
- 85 ITAA 1997, subs 40.25(7)(a).
- 86 ITAA 1997, s 40.635.

- 87 ITAA 1997, sub 40.635(1)(b).
- 88 ITAA 1997, subs 40.635(1)(d).
- 89 ITAA 1997, subs 40.635(1)(e)(i)-(ii).
- 90 ITAA 1997, subs 40.635(1)(e)(iii).
- 91 See for example *Catchment and Land Protection Act 1994* (Vic), s 3: "Land degradation" means... a decline in the quality or productive capacity of land; or... the infestation of land by noxious weeds or pest animals.'
- 92 ATO *Interpretive Decision 2004/714*: the landowner was in primary production and entered into a profit a prende agreement in relation to the carbon sequestration rights.
- 93 See *New Business Tax System (Capital Allowances) Act 2001* (Cth), Schedule 1.
- 94 ITAA 1997, Subdivision 40-G.
- 95 ITAA 1997, Division 31.
- 96 In particular, a private interest is generated and recognisable in the transfer of funds from the funding body to the individual benefit of the landowner. There may also be recognised a private interest to the landowner in improving the environmental qualities of their land. But additionally, there is a benefit to the community as a whole in the environmental values of the land being well managed and/or restored (hence a public interest), including for example improved biodiversity outcomes, water quality outcomes, decreased erosion or salinisation problems, or greater capacity or efficiency in carbon sequestration on that land.
- 97 See Canada Customs and Revenue Agency *Income Tax Technical News No. 26 – Proposed Guidelines on Split Receipting* (2002), <http://www.cra-arc.gc.ca/E/pub/tp/itnews-26/itnews-26-e.pdf> (viewed 11 May 2014); for an overview of recent history of the provisions, see Theresa Man 'Recent Income Tax Amendments that Affect Charities' (2010) *Charity Law Bulletin* No. 221, <http://www.carters.ca/pub/bulletin/charity/2010/chyib221.pdf> (viewed 11 May 2014). Note: America has very similar provisions and sophisticated instruments and stand and surrounding such concessions, including clear links to public sector funding programs under the Farm Bill 2014.
- 98 For a guide to the application of split receipting (and other tax implications) to conservation covenants, see Ann Hillyer and Judy Atkins *Giving it away: tax implications of gifts to protect private land* (West Coast Environmental Law Research Foundation, 2004).
- 99 That is, making a gift of the value of the land associated with foregone opportunities to sell it at the going market rate or developing it. Under the Canadian approach, the 'gift' is the transfer of property and entering into a conservation easement (a conservation covenant) is considered to be a form of transfer of property.
- 100 See ATO 'Market valuation for tax purposes: Part B real property and plant and equipment', [https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Market-valuation-for-tax-purposes/?page=8#Part\\_B\\_Real\\_property\\_and\\_plant\\_and\\_equipment](https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Market-valuation-for-tax-purposes/?page=8#Part_B_Real_property_and_plant_and_equipment) (30 May 2014); also Michael Churchill and Kalem Sammut 'ATO market valuation guidelines: risk business' (2013) 48 *Taxation in Australia* 5 272, <http://www.vaassociates.com.au/assets/20131127-VAA-TTI-article.pdf> (30 May 2014).





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