

# Forest Carbon Rights: Lessons Learned from Australia and New Zealand

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*The global community has agreed to the concept of reducing greenhouse gases emissions through forest sequestration in the post-2020 international climate change regulatory framework. While the concept is included in the December 2015 Paris Agreement, significant legal questions remain about how domestic legal systems will adapt the necessary regulatory frameworks to recognise and protect forest carbon rights, which are fundamental to the operation of a forest sequestration scheme. This article analysis some of the world's first forest carbon regulatory frameworks, in Australia and New Zealand. Drawing lessons from the establishment and development of these regulatory frameworks, this article proposes principles upon which policymakers and others can rely in developing forest carbon regulatory frameworks in the post-Paris Agreement context.*

## I. Introduction

Global consensus is growing on the need to better protect forests by accounting for their benefits, and creating mechanisms to pay for their results. Although overall rates of global deforestation and forest degradation have fallen in recent years, these phenomena have nonetheless contributed an average of 2.9 billion tonnes of carbon dioxide emissions per annum during the period of 2011-2015.<sup>1</sup> In response, policymakers around the world have started to consider mechanisms which incentivise reducing emissions from forest and land use. In this context, a global policy framework for incentivising reduction in deforestation, forest degradation and sustainable forest uses in developing countries (REDD+) has been developed under the UN Framework Convention on Climate Change (UNFCCC).<sup>2</sup>

The REDD+ framework has gained particular momentum since the 2015 Paris Agreement as it was included within that international treaty.<sup>3</sup> The Paris Agreement creates an international framework by which the countries of the world agreed to keep global temperatures to within 'well below 2 degrees' of post-industrialisation temperatures.<sup>4</sup> To achieve this target, the Agreement created a net-zero emissions obligation, meaning that any carbon emissions produced by countries in the second half of this century will need to be sequestered.<sup>5</sup> The inclusion, of REDD+ in Article 5 has the effect of proposing forest carbon as a key approach by which such sequestration can occur.

Despite this growing global recognition for the role of forests in international efforts to reduce emissions to 'well below 2 degrees', there remain few examples of governments who have taken the required

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1 Food and Agriculture Organization of the United Nations, 'FAO assessment of forests and carbon stocks, 1990-2005: Reduced overall emissions, but increased degradation' (2015) <<http://www.fao.org/3/a-i4470e.pdf>> accessed 4 July 2016.

2 Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries (REDD+); 'Carbon and Climate Law Review, Special Issue: The Legal Aspects of REDD+ Implementation: Translating the International Rules into Effective National Frameworks.'

3 Conference of the Parties, United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement* (UN Doc FCCC/CP/2015/L.9/Rev.1, 12 December 2015) art 5 <<https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>> accessed 4 July 2016.

4 *ibid* art 2 [1][a].

5 *ibid* art 4 [1].

steps to establish domestic legal and policy frameworks by which forest carbon can be measured, registered and traded within or between countries. In this context Australia and New Zealand are critically important countries, as they have been early leaders - globally - on designing and implementing forest carbon schemes. In fact, one Australian State, New South Wales (NSW), is credited for having established the world's first forest carbon mechanism.<sup>6</sup> While the NSW scheme no longer continues to operate today, forest carbon mechanisms continue in Australia and New Zealand at a federal level, and have done so for over a decade, providing valuable lessons about designing and implementing such regimes.

In the post-Paris Agreement context, where countries are encouraged to establish REDD+ and other forest carbon sequestration policy frameworks, the purpose of this paper is to highlight the experiences of two countries which have designed and implemented - despite a number of difficulties - forest carbon legal frameworks, so that other governments may draw from these lessons when designing their own schemes. As the examples from Australia and New Zealand demonstrate, introducing a forest carbon scheme is complex as it requires careful management of issues that include the creation of new carbon rights, land tenure arrangements, measures to protect the permanence of projects, and arrangements protecting additionality of the projects.

The paper will analyse the Australian and New Zealand forest carbon schemes in two parts: firstly, it will outline the historical development of the Australian and New Zealand policy frameworks, focus-

ing particularly on the NSW scheme, Australian Commonwealth level policy frameworks and the national level policy in New Zealand. The sections comprising this part of the paper will consider both the policy development process in the relevant jurisdictions and some of the specific legal challenges faced by policymakers. Secondly, the paper will draw out some of the key lessons learned from these countries' forest carbon legal frameworks, from which other countries could draw to create their own schemes.

## II. Climate Change and Forest Carbon Policy Development in Australia

Between 1996 and 2007, the Australian Commonwealth government was led by John Howard's conservative Liberal - National Coalition. Prime Minister Howard was not enthusiastic about climate change, but participated in the 1997 UNFCCC negotiations on the Kyoto Protocol due to growing public sentiment in Australia.<sup>7</sup> During negotiations about the emission targets for Annex 1 countries - of which Australia was one - Australia argued for an emissions target based on 1990 emissions levels. Importantly, Australia refused to ratify the Protocol unless it included a new clause 3.7 - now aptly referred to as the 'Australia Clause' - which would allow countries to include land clearing within their 1990 emissions calculations. This was particularly significant for Australia as land clearing levels in 1990 had been anomalously high and had since reduced, meaning that Australia could effectively increase its emissions profile in other sectors.<sup>8</sup>

Australia's deft negotiation of the 'Australia Clause' into the Kyoto Protocol had the effect of creating an incentive for Australia to try and keep down its emissions profile from the land sector, allowing emissions from other sectors to rise. As a consequence, when a national climate change policy framework was developed in the country, land use and forestry were specifically featured as a key element. However, it was some time after the Kyoto Protocol negotiations before Australia developed a national climate change policy.<sup>9</sup>

While Howard's Coalition government was in power, no comprehensive national climate change law was developed in Australia. Instead, climate change policies were first developed in Australia at

6 This scheme was put in place by the former Australian Labor Party Premier, Bob Carr. Independent Pricing and Regulatory Tribunal (IPART): 'NSW Greenhouse Gas Reduction Scheme, Strengths, weaknesses and lessons learned' (2013), 1 <[https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/nsw\\_greenhouse\\_gas\\_reduction\\_scheme\\_-\\_strengths\\_weaknesses\\_and\\_lessons\\_learned\\_-\\_final\\_report\\_-\\_july\\_2013.pdf](https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/nsw_greenhouse_gas_reduction_scheme_-_strengths_weaknesses_and_lessons_learned_-_final_report_-_july_2013.pdf)> accessed 4 July 2016 (IPART Review).

7 'Global warming exaggerated, former PM John Howard says' *The Australian* (6 November 2009) <<http://www.theaustralian.com.au/national-affairs/climate/global-warming-exaggerated-former-pm-john-howard-says/story-e6frg6xf-1226753872134>> accessed 4 July 2016.

8 Clive Hamilton, 'Australia hit its Kyoto target, but it was more a three-inch putt than a hole in one' *The Conversation*, 16 July 2015 <<http://theconversation.com/australia-hit-its-kyoto-target-but-it-was-more-a-three-inch-putt-than-a-hole-in-one-44731>> accessed 4 July 2016.

9 *ibid.*

a state level in the early 2000's, with NSW taking the lead with its Greenhouse Gas Reduction Scheme (GGAS). GGAS was primarily a baseline and credit scheme with sinks and energy efficiency actions being the dominant offsets (on baseline and credit schemes as opposed to cap-and-trade see, in this issue, the article of Streck and von Unger). Australia operates under a federal government structure, with the Commonwealth government being granted certain powers under the Constitution to make laws over prescribed matters on an exclusive or shared basis (with the Australian States and Territories).<sup>10</sup> Residual powers - those law making powers not listed in the Constitution - are given to the States and Territories exclusively.<sup>11</sup> Climate change is a policy area which is not given over exclusively to the Commonwealth government to regulate, opening up the possibility of State and Territory regulation of the issue.<sup>12</sup> Additionally, property law in Australia is largely regulated at a State and Territory level, meaning that subnational governments would need to play a regulatory role with respect to climate change matters affecting property rights and carbon rights directly. On this basis, States and Territories, like NSW, have made laws on climate change.

In 2012, the GGAS scheme was ultimately wound up following the introduction of a comprehensive Commonwealth climate change policy framework.<sup>13</sup> In 2010, the Australian Labor Party (ALP) sought to

introduce a Carbon Pollution Reduction Scheme (CPRS) - a national emissions trading scheme. However, the CPRS never became law, as it failed to win the support of a majority of Senators in the Australian Senate.<sup>14</sup> In 2011, the ALP again tried, and was successful in, introducing a package of national climate change laws - the Clean Energy Futures Package (CEF).<sup>15</sup> The CEF also included an emissions trading scheme, built with two phases, transitioning from a fixed to a floating carbon price. Importantly, the CEF included the Carbon Farming Initiative (CFI) as a mechanism to incentivise emission reductions from land use. The CFI allowed farmers and land managers to earn carbon credits by storing carbon or reducing greenhouse gas emissions on the land and generating offsets for such carbon.<sup>16</sup>

In 2013, the Conservative Liberal-National Coalition was elected back to government at a Commonwealth level in Australia, on a platform which prominently included the repeal of the so-called 'carbon tax' element of the CEF. Although the Coalition government removed many aspects of the CEF including the emissions trading scheme, it retained the CFI concept and a fund - the Emission Reduction Fund (ERF) - through which forestry offsets could be purchased by the government.<sup>17</sup> Below we outline the legal frameworks for both the NSW's former GGAS and the current Commonwealth scheme incorporating the CFI and ERF.

10 Tony Blackshield and George Williams, 'Australian Constitutional Law and Theory Commentary and Materials' (5th edn abridged, The Federation Press 2010) 207. S 51 of the *Australian Constitution* confers power on the Commonwealth Parliament to legislate 'with respect to' certain topics. S 51 also contains concurrent powers held by both the Commonwealth and the States. All other powers are exercised by the States.

11 S 108 of the Constitution reinforces that the States retain residual powers for any power not specified within the Constitution. This reflects the colonial history of Australia as each colony had retained certain powers. Residual powers can include law and order, education, public health, and transport. Alan Fenna, Jane Robbins and John Summers, 'Government and Politics in Australia' (Pearson Australia 2014) 89.

12 For further discussion on Commonwealth and State climate change regulation, see: Judith Preston and Jennifer Scott, 'Meeting the climate change challenge in local government decision-making with the use of sustainable climate change adaptation modelling' (2012) 17 *Local Government Law Journal* 135; Kate McCrossin, 'A critical analysis of the extent to which international environmental law has influenced Commonwealth legislation and policies, and New South Wales legislation, with respect to climate change' (2007) 12 *Local Government Law Journal* 230

13 IPART Review (n 6) 1.

14 Included among the Senators who opposed the CPRS were the Senators representing the Australian Greens Party, who did not

support the CPRS on the basis that the emission reduction targets should have been more ambitious. Department of Parliamentary Services, '2010 Federal Election: a brief history' (Research Paper No 8, 2011-2012) 6.

15 The package included the Clean Energy Act 2011 which introduced the carbon pricing mechanisms. Additionally, the Clean Energy Regulator Act 2011 and the Climate Change Authority Act which established a governance framework for carbon pricing. The Clean Energy Regulator commenced on 2 April 2012 as a statutory authority which implemented and administered the carbon pricing mechanism. The Climate Change Authority acted as an independent body which provided advice regarding climate change policy. The package also included the Household Assistance Package which used tax cuts and government payments to assist Australian households in contributing to clean energy without a financial burden.

16 Australian Government Department of the Environment, 'About the Carbon Farming Initiative' <<http://www.environment.gov.au/climate-change/emissions-reduction-fund/cfi/about>> accessed 4 July 2016.

17 Australian Government Department of the Environment, 'The Carbon Farming Initiative Amendment Bill and the Emissions Reduction Fund' <<http://www.environment.gov.au/system/files/resources/71e3d7a4-b1f3-450a-ada7-75098e066003/files/erf-fs-carbon-farming-initiative-amendment-bill-emissions-reduction-fund.pdf>> accessed 4 July 2016.

## 1. Forest Carbon under the NSW Government GGAS Scheme

The NSW State Parliament passed legislation in December 2002 which amended the Electricity Supply Act 1995 (NSW) to require electricity retailers and certain other entities including large electricity users (such as aluminium smelters), collectively referred to as 'benchmark participants', to meet mandatory targets for reducing or offsetting the emission of greenhouse gases from the production of the electricity they supply or use. This was the basis of the government's GGAS scheme.

The Scheme's Greenhouse Gas Benchmark (Carbon Sequestration) Rule No 5 (Carbon Sequestration Rule) made provision for Abatement Certificates to be created from forest sinks, which could subsequently be used by benchmark participants to meet their emission reduction obligations. The Carbon Sequestration Rule was designed to be consistent with Article 3.3 of the Kyoto Protocol, and recognised afforestation and reforestation activities.<sup>18</sup> Project developers used this Rule to design and develop forest carbon sequestration projects in the State.

The eligibility criteria for such Abatement Certificates was as follows:

### a. Project Structure and Registration

Under the GGAS Scheme, only an Abatement Certificate Provider could generate Abatement Certificates. An entity accredited under the NSW Scheme to create Abatement Certificates on the basis of carbon sequestration could become an Abatement Certificate Provider.<sup>19</sup> A range of entities became Abatement Certificate Providers, including state-owned forestry

companies, private sector entrepreneurs and NGOs.<sup>20</sup>

The GGAS Scheme required sequestration project developers to mitigate the risks arising from reliance on one plantation to generate credits, by requiring that project developers managed a Carbon Sequestration Pool on eligible land. A Carbon Sequestration Pool was an aggregation of forests managed to provide carbon sequestration.<sup>21</sup> The forests could be commercial plantations or native vegetation planted for biodiversity purposes. However, a single plot of land could not be registered as a Carbon Sequestration Pool. The purpose of the Carbon Sequestration Pool requirement was to spread permanence risks (eg bushfires) across a range of different forests in different locations, rather than accrediting all abatement to one forest which could be destroyed by a single event.

### b. Land and Carbon Rights

A Carbon Sequestration Right was created into law to give rise to a registrable property right to carbon sequestered on a particular piece of land. Under the Conveyancing Act 1916 (NSW) as amended by the Carbon Rights Legislation Amendment Act 1998 (NSW), the legal title to carbon sequestered by a forest on a piece of land is defined as a '*profit a prendre*' and a type of forestry right.<sup>22</sup> It can be registered separately from the ownership of the land, and also from the ownership of the trees on the land.

The effect of designating a property-based carbon right as an independent form of proprietary interest is that benefits associated with carbon sequestration can be 'unbundled' from the underlying land asset and are capable of being assigned independently of the land and the timber where the carbon is stored.

In other words, a Carbon Sequestration Right was simply a registrable property right to any carbon sequestered on a certain piece of land. The fact that a Carbon Sequestration Right exists did not guarantee that there is any carbon actually sequestered (for example, it is possible to own a Carbon Sequestration Right over a car park). However, if there are plantations on the relevant land, it was possible to measure the carbon sequestered by those plantations to create carbon credits (or Abatement Certificates under the NSW Scheme).

Under the NSW legislation, the owner of the land had the prima facie right to register and assign a Car-

18 Greenhouse Gas Benchmark Rule (Carbon Sequestration) No 5 of 2003, cl 7.2 <[http://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/compliance\\_and\\_performance\\_monitoring\\_of\\_acps\\_-\\_carbon\\_sequestration\\_rule\\_-\\_14\\_february\\_2014.pdf](http://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/compliance_and_performance_monitoring_of_acps_-_carbon_sequestration_rule_-_14_february_2014.pdf)> accessed 4 July 2016.

19 *ibid* cl 5.

20 IPART Review (n 6) 5. Examples of entities involved as Abatement Certificate Providers include Integral Energy, Energy Developments Ltd, AGL, International Power, IP Hazelwood and Origin Energy.

21 Greenhouse Gas Benchmark Rule (n 18) cl 11.1.

22 Conveyancing Act 1919 (NSW) s 88AB, as amended by Carbon Rights Legislation Amendment Act 1998 (NSW).

bon Sequestration Right.<sup>23</sup> If no Carbon Sequestration Right was registered in respect of a particular piece of privately owned land<sup>24</sup> then the landowner was vested with the legal title to carbon sequestered on that land. Other Australian States have also adopted similar legislation, but drafted in slightly different terms.<sup>25</sup>

Carbon rights under the NSW scheme had a number of features:

- it puts anyone who wishes to deal in an interest in the underlying land where the sequestration is occurring (such as purchasers, mortgagees etc) on notice that the Carbon Sequestration Right exists. This is not an encumbrance on the land, as such, but simply a way of informing those who deal with the land of the profit associated with the land;
- it 'runs with' the land (ie unless the holder of the Carbon Sequestration Right terminates the Carbon Sequestration Right, future owners of the land are bound to recognise the holder's entitlement to sequestered carbon); and
- it provides assurance to purchasers and government regulators that they are dealing with the entity that is properly entitled to create and sell carbon arising from a plantation activity on a particular piece of land. This is particularly important in commercial forestry projects or community forestry projects where a number of diverse entities may have some entitlement to the land and the trees.

In order to have become an Abatement Certificate Provider under the NSW Scheme, an entity had to satisfy the Scheme Administrator that it exercised 'control sufficient to enforce Carbon Sequestration Rights' over the eligible land.<sup>26</sup> For this requirement to have been met:

- Carbon Sequestration Rights had to be registered on the title of each parcel of land in the Carbon Sequestration Pool;<sup>27</sup> and
- if the entity applying to be the Abatement Certificate Provider was not the owner of the Carbon Sequestration Right, it had to provide evidence that it had a legal entitlement to control the owner of the Carbon Sequestration Right in terms of the manner in which they enforce that Carbon Sequestration Rights. Evidence of sufficient control could include, for example, copies of contracts with landowners.

### c. Eligible Forest Land and Additionality

A further requirement under the GGAS scheme was that the entity had to undertake afforestation or reforestation activities on the eligible land (minimum height, crown cover and width restrictions applied)<sup>28</sup> with the result that an 'Eligible Forest' is created.

Further, the scheme required that Eligible Forests were additional. Abatement Certificates could only be created in respect of carbon sequestered on or after 1 January 2003, and only where it had not been 'brought to account or traded' for any purpose other than the creation of Abatement Certificates under the NSW Scheme.<sup>29</sup> The purpose of this provision was to avoid so called 'double counting' of the carbon underlying the Abatement Certificates.

Abatement Certificates were accredited for 'net change' in Carbon Stock over a certain period due to human-induced activity (Carbon Sequestration Activity). The process for calculating this was set out in an 'Australian Standard',<sup>30</sup> a non-regulatory instrument often used by governments in Australia to set out technical compliance matters.

This Standard allows the Carbon Stock to be estimated using a variety of methodologies. However, the forest manager must be able to demonstrate (based on an uncertainty analysis) a 70% probability that the net increase in the area's Carbon Stocks is greater than the number of Abatement Certificates

23 Greenhouse Reduction Abatement Scheme General Accreditation Conditions, cl 6.1, <[https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/compliance\\_and\\_performance\\_monitoring\\_of\\_acps\\_-\\_general\\_accreditation\\_conditions\\_-\\_14\\_february\\_2014.pdf](https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/compliance_and_performance_monitoring_of_acps_-_general_accreditation_conditions_-_14_february_2014.pdf)> accessed 4 July 2016; Conveyancing Act 1919 (NSW) s 88E.

24 Crown land is subject to a separate property legislation.

25 The other State legislation recognising Carbon Sequestration Rights (in various forms) is: the Forestry and Land Title Amendment Act 2001 (Qld); the Forestry Rights (Amendment) Act 2001 (Vic); the Carbon Rights Act 2003 (WA); the Forest Property Act 2000 (SA); and the Forestry Rights Registration Act 1990 (Tas). [Note: Queensland also introduced the Waste Reduction and Recycling Act 2011 (Qld) which recognised carbon sequestration rights in the Forestry Act, the Nature Conservation Act, the Land Act and the Land Title Act.]

26 Greenhouse Gas Benchmark Rule (n 18) cl 11.1.

27 Conveyancing Act 1919 (NSW) s 87A.

28 The scheme also required an Eligible Forest to: (a) be a minimum of 0.2 hectares; (b) have at least 20% crown cover at maturity; and (c) consist of trees with the potential to reach a height of 2 metres at maturity. Greenhouse Reduction Abatement Scheme General Accreditation Conditions (n 23) cl 11.1.

29 *ibid* cl 7.1.

30 AS4978.1 2006 – Carbon Accounting for Greenhouse Sinks Part 1: Afforestation and Reforestation.

it has created.<sup>31</sup> This results in the creation of more certain or reliable Abatement Certificates, and provides a direct financial incentive for participants to establish accurate systems for estimation.<sup>32</sup> Forests must also be periodically monitored to verify the amount of carbon stored.

#### d. Permanence

A key issue for all forest carbon schemes is to ensure permanence, and this was a matter considered closely by the NSW government. Under that State's scheme, the entity had to be able to demonstrate to the Scheme Administrator that legal arrangements were in place so that it could maintain the abatement achieved by a Carbon Sequestration Activity for one hundred years from the date at which the resultant Abatement Certificates are registered.<sup>33</sup> If sequestration is not maintained for one hundred years, then the Abatement Certificate Provider may be required to 'make good' the sequestration shortfall by surrendering Abatement Certificates from other forest projects.<sup>34</sup>

In order to meet the permanence requirements, the approach to carbon sequestration must be con-

sistent with the long term maintenance of Carbon Stock. For example, a clear-fell forestry project with no plans to replant after clearing would be ineligible. Furthermore, for each Eligible Forest, a 'Restriction on the Use of Land by a Prescribed Authority' (Restriction On Use) must be registered for the benefit of the Scheme Administrator on the title of the respective parcel of Eligible Land. The requirements in the Restriction on Use are triggered if there is clear evidence that the Carbon Stock in the Sequestration Pool has fallen (or is likely to fall) below the minimum level. If this occurs, the landowner must take action (as required by the Scheme Administrator) to restore, replant, replace, reinstate and/or re-establish any trees forming part of the Eligible Forest.<sup>35</sup>

After an Abatement Certificate Provider has created Abatement Certificates, the Abatement Certificate Provider can only reduce or sell its Sequestration Pool by seeking the approval of the Scheme Administrator to assign its ongoing sequestration obligations to another accredited Abatement Certificate Provider.<sup>36</sup> The permanence requirement was very difficult to satisfy, particularly given the long time periods involved, the generally accepted duration of contracts, and the variability of land use over time. Despite this, a number of carbon sink projects nonetheless achieved registration under the NSW Scheme.

## 2. Commonwealth Emission Reduction Fund and Carbon Farming Initiative

While the Commonwealth Government's CFI and ERF policies came after the GGAS scheme, the approach to creating and registering carbon rights under the Commonwealth policies differ to the State based scheme. The ERF is an AUD \$2.55 billion fund created by the Commonwealth government to incentivise emissions reduction activities across the Australian economy. It has three primary elements - crediting, purchasing and safeguarding.<sup>37</sup>

The ERF forms a central pillar of the Australian Government's approach in addressing climate change and meeting its international obligations under the United Nations Framework Convention on Climate Change. The Government has committed to reduce greenhouse gas (GHG) emissions by 5% below 2000 levels by 2020 under the Kyoto Protocol's second commitment period.<sup>38</sup> It has also recently committed to reduce GHG emissions by 26-28% be-

31 Greenhouse Reduction Abatement Scheme General Accreditation Conditions (n 23) cl 8.3.1.

32 Charlotte Streck et al (eds), 'Climate Change and Forests: Emerging Policy and Market Opportunities' (Royal Institute of International Affairs 2008) 263.

33 Greenhouse Reduction Abatement Scheme General Accreditation Conditions (n 23) cls 5 and 8.3.2.

34 *ibid.*

35 The Scheme Administrator under pt 8A of the Electricity Supply Act 1995 (NSW) has capacity to require such action; see 'Restrictions on use Terms' (14 February 2014) 4 <<https://www.ipart.nsw.gov.au/Home/Industries/Energy/Energy-Savings-Scheme/Greenhouse-Gas-Reduction-Scheme/Compliance-performance-monitoring-of-ACPs/Restrictions-on-use-Terms-14-February-2014>> accessed 4 July 2016.

36 *ibid.*

37 This paper does not discuss the safeguard mechanism in detail. In short, the safeguard mechanism is designed to ensure that emissions reductions paid for through the crediting and purchasing elements of the ERF are not displaced by significant increases in emissions above business-as-usual levels elsewhere in the economy. For further details see Baker & McKenzie, 'Australia's Emission Reduction Fund Safeguard Mechanism - Top 10 Considerations for Companies' (4 March 2016) <http://www.bakermckenzie.com/en/insight/publications/2016/03/australias-emission-reduction-fund-safeguard/> accessed 4 July 2016.

38 Ambition review under the Kyoto Protocol second commitment period and update on Australia's greenhouse gas emissions projections, May 2014 (UNFCCC Submission) <[http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/39\\_62\\_130447021955940697-140514\\_australia\\_submission.pdf](http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/39_62_130447021955940697-140514_australia_submission.pdf)> accessed 4 July 2016.

low 2005 levels by 2030 under the Paris Agreement.<sup>39</sup> In the absence of direct measures to limit Australia's GHG emissions from industry and other sectors, the creation of offsets, including from forest carbon, through the ERF is critical - particularly for achieving the country's 2030 target.<sup>40</sup>

The ERF is administered by the Clean Energy Regulator. It builds on the original CFI architecture and is enacted through the Carbon Credits (Carbon Farming Initiative) Act 2011 (CFI Act), the Carbon Credits (Carbon Farming Initiative) Regulations 2011 (CFI Regulation) and the Carbon Credits (Carbon Farming Initiative) Rule 2015 (CFI Rule). Below we set out the key conditions of the ERF crediting framework.

#### a. Project Structure and Registration

ERF projects are broadly divided into land-based sequestration projects, and projects which take steps to avoid emissions that would otherwise have occurred. Projects which fall within one of the specified activity types (as detailed for each activity type in an applicable methodology determination) and which complete the project declaration process are then able to generate Australian Carbon Credit Units (ACCUs) according to the emissions abatement achieved. Some of the project categories in the land sector include: increasing soil carbon, reducing livestock emissions, expanding opportunities for environmental and carbon sink plantings, and reforestation.

Once registered, projects may commence their crediting activities<sup>41</sup> and be eligible to participate in the purchasing process via regular 'reverse auctions' under which Kyoto ACCUs generated may be sold to the Commonwealth government. Kyoto ACCUs are ACCUs which may be counted towards Australia's 2020 emissions reduction target under the Kyoto Protocol. Any ACCU that is not a Kyoto ACCU is a non-Kyoto ACCU. The distinction has limited ongoing relevance, as following a change to the international accounting rules, Australia elected to count almost all land-based activities towards the 2020 target, and all ACCUs issued under the ERF after are now Kyoto ACCUs.

The reserve auction process is run by the Regulator CER, who calls for confidential formal bids from different project developers. The received bids outline the project(s), the number of ACCUs offered for sale, and the unit price of ACCU that project developers would be prepared to accept. Internally, and

without public disclosure, the CER sets a 'benchmark price'. Projects that have proposed an ACCU price above the benchmark will not be selected, while most bids below that level would be accepted. Those bids which are selected get the bid price, not the benchmark price.

At the time of writing the ERF has held three reverse auctions in 2015 and 2016. In the first auction held in April 2015 more than 47 million tonnes of future abatement was contracted.<sup>42</sup> The average price per tonne for each of the three auctions to date has been AUD \$13.95, AUD \$12.25 and AUD \$10.23, for auctions in April 2015, November 2015 and April 2016 respectively.

#### b. Permanence and Crediting Period

The proponent must nominate the project's crediting period which is generally seven years for emissions avoidance projects and 25 years for sequestration projects unless the applicable methodology provides otherwise.<sup>43</sup> At this point, proponents of sequestration projects must also request that the project's permanence period be either 25 or 100 years.<sup>44</sup> These timeframes effectively set the duration of the project. It should be noted that the permanence period for a sequestration project once determined cannot be varied.<sup>45</sup> Significant reversal of abatement

39 Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement, August 2015 (Submitted to UNFCCC) 1, para 3 <<http://www4.unfccc.int/Submissions/INDC/Published%20Documents/Australia/1/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>> accessed 4 July 2016.

40 Energetics, 'Australia's 2030 climate change emissions reduction target - abatement potential Report to the Department of the Environment' (2016) 5 <<https://www.environment.gov.au/system/files/resources/b8540c8a-8a31-4aba-a8b5-63cc46466e33/files/australias-2030-abatement-potential-summary.pdf>> accessed 4 July 2016.

41 Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) s 27.

42 Australian Government, Clean Energy Regulator, 'Carbon Farming Initiative/Emissions Reduction Fund' <<http://www.cleanenergyregulator.gov.au/About/Pages/Accountability%20and%20reporting/Annual%20Reports/Annual%20report%202014-15/Carbon-Farming-InitiativeEmissions-Reduction-Fund.aspx>> accessed 4 July 2016.

43 Australian Government, Department of the Environment, 'The Emissions Reduction Fund: Crediting' (2014) <<http://www.environment.gov.au/system/files/resources/438b09ae-e947-4aa6-a17f-17f4fc6e643c/files/erf-fs-crediting.pdf>> accessed 4 July 2016.

44 Carbon Credits (Carbon Farming Initiative) Act 2011 s 23 [1][g] (CFI Act).

45 CFI Act 2011 s 31A.

during the permanence period may lead to a requirement to relinquish ACCUs. Following completion of the permanence period, there is no further obligation to maintain the project.

### c. Eligible Projects and Additionality

The ERF framework is structured to try and incentivise genuinely new emission reductions projects, rather than to support projects which may have been established without the program. To do this, the scheme includes a number of rules regarding which projects it will accept.

Firstly, projects have to meet a so-called 'newness requirement'.<sup>46</sup> The purpose of this rule is to ensure that the ERF is a genuinely stimulating demand for new emissions abatement projects, rather than simply supporting existing projects. The newness requirement generally requires that a project has not yet begun to be implemented, although under certain methods, an alternative newness requirement applies, which may permit an earlier project start date.<sup>47</sup> The Act provides guidance on the factors which may indicate whether or not a project has begun to be implemented.<sup>48</sup>

In addition, the Regulator will only allow projects to be considered eligible if they meet certain 'additionality requirements'.<sup>49</sup> The additionality requirements involve satisfying the 'regulatory additionality requirement': that a project is not required to be carried out by or under a law of the Commonwealth, a State or Territory. Further, projects must meet the

'government program additionality requirement'; that is, a declaration that the project would be unlikely to be carried out under another Commonwealth, State or Territory government programme in the absence of the declaration.<sup>50</sup>

### d. Landholder Consent

Under the ERF, the Commonwealth requires project proponents to demonstrate that they have the relevant rights and interests on the land they are proposing to carry out the abatement activities. Proponents are required to provide the Regulator with written consent to the application from each 'eligible interest holder'.<sup>51</sup> This includes everyone with a legal interest in the relevant land, such as lessees, mortgagees, the relevant State Minister for projects on State land, certain categories of native title rights holders.<sup>52</sup> For State land, the use of the land for ERF projects must also be consistent with any restrictions on the use of the land and with the specific conditions of the particular tenure.

Additionally, the ERF also intersects with Australia's system of Indigenous land rights - called native title. The native title system recognises that Indigenous people have rights and interests to their land that come from their traditional laws and customs. To access native title, Indigenous claimants have to make an application to the Australian Federal Court with respect to land on which native title has not been 'extinguished'.<sup>53</sup> With respect to ERF projects on State or Commonwealth land, on which native title has not been extinguished, proponents may be required to negotiate an Indigenous Land Use Agreement (ILUA) with registered native title claimants (or holders) in order to satisfy the consent requirements.

An ILUA is a registrable contractual document which authorises private entities to agree to the use of registered native title land.<sup>54</sup> This can be a protracted process and be resource intensive, in relation to timing and costs.

### e. Legal Right to Carry Out Project

As noted above, a project proponent must demonstrate that it is responsible and has the legal right to carry out the project.<sup>55</sup> 'Legal right' is not defined in the CFI legislation, in part in order to maintain flexibility in how proponents may allocate that right

46 Carbon Credits (Carbon Farming Initiative) Rule 2015 r 14 (2), pt 3 (CFI Rule).

47 CFI Act 2011 s 27 [4A][a].

48 CFI Act 2011 s 27 [4B].

49 CFI Act 2011 s 27 [4].

50 CFI Act 2011 s 27 [4A].

51 CFI Rule 23.

52 CFI Act 2011 ss 43-45.

53 Through statute the Commonwealth has declared that certain native title was 'extinguished' by acts which occurred following.

54 ILUAs are voluntary agreements regarding native title matters that are binding between either a native title group or Registered Native Title Body Corporates and other parties. The registered document binds the parties holding native title in the Area Agreement. An ILUA is able to cover issues such as access to areas, future developments, mining and cultural heritage. Registering the ILUA binds all parties to the agreement.

55 Carbon Credits (Carbon Farming Initiative) Act 2011 ss 15 and 43.

amongst multiple project entities across a variety of project structures. However, the CER has stated that to demonstrate legal right, the proponent must show it has the right to carry out the project activities on or for the sites or assets included in the project, and the exclusive right to issue all ACCUs that may be created as a result of the project activities.<sup>56</sup>

The legal right can be assigned to a particular party (from a range of entities with an interest in the project) by commercial agreement. The legal right to carry out the project must subsist for at least the project's crediting period. In practice, demonstrating the legal right usually involves establishing the proponent has either a contractual or proprietary right to occupy and use the land or assets for the project, and the exclusive right to the economic benefits from emissions reduction or avoidance activity.

### III. Forest Carbon Policy and Legislative History in New Zealand

New Zealand's legislative framework for climate change and forest rights, like in Australia, was introduced by the country's Labour Party. In 2002, the government passed the Climate Change Response Act (CCRA), establishing the framework under which New Zealand could meet its Kyoto Protocol commitments. In 2008, the government introduced the Climate Change Response (Emissions Trading) Amendment Act 2008, establishing the New Zealand Emissions Trading Scheme (NZ ETS). Initially the NZ ETS covered only the forestry sector reflecting the large Land Use, Land Use Change and Forestry (LULUCF) contribution to emissions in the country, but between 2008 and 2013 the scope of the NZ ETS expanded beyond LULUCF to include other sectors, including fossil fuels and transport (2010), industrial sectors (2010) and waste (2013).

Shortly after the establishment of the NZ ETS, the global financial crisis caused political ructions in the country, and contributed to the November 2008 general election of a conservative coalition of parties forming a minority government. In light of the financial crisis, the coalition moved to ease some of the burden of the NZ ETS in certain sectors through the introduction of the Climate Change Response (Moderated Emission Trading) Amendment Act 2009. This Act introduced measures such as '2 for 1' compliance, whereby emitters could surrender emissions units

covering just 50% of their emissions (so each 1 tCO<sub>2e</sub> unit covers 2 tCO<sub>2e</sub> of emissions) at a fixed price of NZ \$25 for 2 tCO<sub>2e</sub>. These measures were initially designed to expire at the end of 2012, but have been extended.<sup>57</sup>

A number of other changes were introduced by the government to dilute the impact of the NZ ETS through the Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012 (Amendment Act 2012), which came into force in September 2013. Additionally, New Zealand started to withdraw from its formerly active involvement in international climate change frameworks. In December 2013, the government opted out of the second commitment period of the Kyoto Protocol, resulting in NZ ETS participants being no longer able to use Kyoto Protocol units, such as emission reduction units (ERUs), for compliance from June 2015. At the Paris Agreement, the government announced a modest 2030 GHG target of 30% below 2005 level (11% below 1990 level).<sup>58</sup>

Prior to introducing the NZ ETS, the New Zealand government had also developed and introduced a market based incentive scheme for land owners to grow and maintain forests on a permanent basis, similar to the Australian Government's ERF, called the Permanent Forest Sink Initiative (PFSI). The PFSI was designed to try and reintroduce forest cover to over 1 million hectares of pasture land in New Zealand which had been deforested but could not be efficiently used for agricultural purposes. The PFSI works by issuing Kyoto Protocol compliant units equivalent to the emissions sequestered by the planted forests, which land holders could sell into compliance or voluntary markets. However, the combination of the collapse of the international market for such units, and the changes described above to the NZ ETS, the impact of the PFSI in recent years has been marginal. For these reasons, in 2015 the govern-

56 Australian Government, Clean Energy Regulator, 'Legal Right' <<http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Planning-a-project/Legal-right>> accessed 4 July 2016.

57 At the time of writing the New Zealand Government is planning to phase out such restrictions over a three year period, starting on 1 January 2017.

58 New Zealand's Intended Nationally Determined Contribution, July 2015 (Submitted to UNFCCC) 1 <<http://www4.unfccc.int/Submissions/INDC/Published%20Documents/New%20Zealand/1/New%20Zealand%20INDC%202015.pdf>> accessed 4 July 2016.

ment held a consultation on the PFSI considering changes to the scheme.<sup>59</sup>

## 1. Forestry under the New Zealand Emissions Trading Scheme (NZ ETS)

The New Zealand government designed the forestry aspects of the NZ ETS to reflect the country's then Kyoto Protocol obligations which requires them to reduce its overall emissions to 1990 levels or meet the cost of any excess. Consequently the NZ ETS is designed to regulate forests differently depending on whether they grew prior to 1990 (called 'Pre-1990' forests) or after 1989 ('post-1989' forests).

### a. Pre-1990 Forests

Pre-1990 forests are areas which were 'forest land'<sup>60</sup> on 31 December 1989 and remained forest land on 31 December 2007 and predominantly exotic forests.<sup>61</sup> Landholders which have pre-1990 forests on their land, are obliged to participate in the NZ ETS. Under the scheme, the forest owners are allowed to engage in harvesting activities as long as trees are replanted and the forest is maintained. They are only liable to any consequences if they deforest their forests by more than 2 hectares, except where an exemption has been granted for forest owners with less than 50 hectares of forest area.

Where landholders do attract a deforestation liability, they have to surrender emission units equivalent to the area deforested. Additionally, the Amendment Act 2012 introduced an option for pre-1990 forestry owners to also offset their deforestation lia-

bility by planting an equivalent new forest area that achieves the same carbon stocks as the area of land that they have deforested.<sup>62</sup>

### b. Post-1989 Forests

Owners of forests established after 1989 have the option of entering into the scheme or not. If they commit to the scheme, they can either earn New Zealand Units (NZUs) if the carbon stocks of their forests increase because of tree growth, or surrender NZUs if the stocks decrease because of activities such as harvesting from 1 January 2008. Under the scheme, they are liable to carbon loss from any reason, and are responsible to repay the required NZUs. On the other hand, for forests that have not entered the ETS, the government takes responsibility for changes in the carbon stocks, credits earned and responsibility for future liabilities.

## 2. Forestry under the Permanent Forest Sink Initiative (PFSI)

Unlike the NZ ETS which allows for variability of forest land, the PFSI has a strong emphasis on creating permanence and additionally.

The PFSI is listed under Part 3B of the Forests Act 1949 as a mechanism to allow 'landowners to access value created by Kyoto Protocol of carbon sequestration on land through establishment of forest sink covenants.'<sup>63</sup> The PFSI is further regulated by the Forests (Permanent Forest Sink) Regulations 2007.

The PFSI enables private landowners to receive carbon units through the creation of forest sinks - new permanent forests on Kyoto-compliant land actively established from 1 January 1990.<sup>64</sup> Kyoto compliant land is land that must not have been in forest at 31 December 1989. Active steps such as planting, seeding or facilitating natural regeneration must have been taken to create the eligible forest.<sup>65</sup> The carbon units in the first commitment period were Assigned Amount Units (AAU) because they could be issued before the true-up period and be banked. However, New Zealand Units (NZUs) have been used after 1 January 2013.

### a. Eligible Forests

Forests eligible to participate in the PFSI are areas of land of at least one hectare that has, or will have at

59 Ministry of Primary Industries New Zealand, 'Proposed improvements to the Permanent Forest Sink Initiative' (2015) <<http://www.mpi.govt.nz/news-and-resources/consultations/proposed-improvements-to-the-permanent-forest-sink-initiative/>> accessed 4 July 2016.

60 Under the NZ ETS, forest land is an area of at least one hectare of forest species that has, or is likely to have: tree crown cover of more than 30% on each hectare; and an average tree crown cover width of at least 30 metres. Climate Change Response Act 2002 (NZ) s 4.

61 Climate Change Response Act 2002 (NZ) s 4.

62 New Zealand Climate Change Response Act pt 5, s 186A.

63 New Zealand Forest Act 1949 s 3(B).

64 Forests Act 1949 (NZ) pt 3B.

65 Ministry for Primary Industries, 'Guide to the Permanent Forest Sink Initiative' (2015) 4 <<https://www.mpi.govt.nz/document-vault/6940>> accessed 4 July 2016.

maturity, tree crown cover (or equivalent stocking level) of more than 30% in each hectare in which the trees have the potential to reach a minimum height of five metres at maturity in the place where they are located.<sup>66</sup> Eligible forest includes areas normally forming part of an eligible forest that are temporarily unstocked as a result of human interventions, such as harvesting or natural causes, but which are expected to revert to forest. Ineligible forest includes horticultural crops, shelterbelts which are less than 30 metres wide on average, and forest which is less than 30 metres wide on average unless it is contiguous with eligible forest.<sup>67</sup>

Along with meeting the eligibility criteria, the landowner is required to develop a forest sink plan and has to maintain the forest sink area accordingly. Its primary purpose is to account that landowners have established a permanent forest or are in due process to do so. The forest sink plan should include details of the forest establishment process, harvesting plans (if any), and a map showing the boundaries of the forest sink area, and contact details for access to the forest sink area.<sup>68</sup>

#### b. Covenant with the Crown

Once the application is approved, the landowner and the Crown agree to a Covenant with respect to land use. The covenant is a contract between the two parties which sets out the rights and obligations of each. It remains in force for at least 50 years but may be terminated earlier if New Zealand withdraws from the Kyoto Protocol, the protocol lapses, or if there is a material breach of the covenant.<sup>69</sup> Termination may also occur under other grounds for termination as set out in the covenant. After 50 years, the landowner is eligible to terminate the covenant or remove any part of the forest sink area from the covenant. If part of the area is withdrawn, the landowner must repay units pro-rata on area.<sup>70</sup>

Under the covenant, the landowner must provide the Crown with access to the forest sink area for various purposes related to measurement and reporting of carbon sequestration, monitoring and enforcement of compliance with the PFSI regulations, and verifying land eligibility. But, the landowner must be given 48 hours' notice. The covenant also states that harvesting or destruction of eligible forest inside the forest sink is not permitted during the first 99 years. However, exceptions can be made when felling in ac-

cordance with continuous cover forestry, or as permitted in the forest sink plan. After 99 years, harvesting can be done by complying under Continuous Cover forestry scheme The PFSI Covenant does not restrict the Crown's right to amend any required legislation or regulations and provides authority to take necessary action to restore the forest sink if the landowner breaches the terms and conditions as set out in the covenant. The Crown may also claim the reasonable costs associate with it from the landowner.<sup>71</sup>

## IV. Lessons from the Australian and New Zealand Forest Carbon Schemes

The NSW GGAS scheme, ERF, PFSI and NZ ETS have each come to fruition in the face of challenging domestic and international political and economic circumstances. In this context, the development and implementation of these forest carbon schemes provides a number of lessons from which policymakers from other countries can draw, in creating their own forest carbon frameworks. In this section of the paper, we outline what we consider to be the key lessons which these schemes demonstrate.

### 1. Develop a Holistic Scheme to Ensure Forest Carbon Contributes to Overall National Emission Reduction Targets

The policy framework for forest carbon in New Zealand provides a good example of a regime designed with the country's international commitments - under the Kyoto Protocol - in mind. The NZ ETS and PFSI policies are tied to New Zealand's 1990 year commitment under the Kyoto Protocol, creating obligations and incentive structures tied to forests existing at that year. Additionally, the NZ ETS and the PFSI work together emphasising different elements of forest emissions policy. The NZ ETS accounts for and creates a disincentive for deforestation of existing forests,

66 *ibid.*

67 *ibid.*

68 *ibid.* 7.

69 *ibid.* 9.

70 *ibid.*

71 *ibid.*

and thus captures commercial logging and agricultural operations. Meanwhile the PFSI was intended to create an incentive for increased reforestation.

Australia's approach, by contrast, has not been tied to the country's overall emission reductions target. While the Commonwealth government has set an overall target to reduce emissions by 26-28% below 2005 levels by 2030, the overall national policy framework is not designed to specifically meet this target (although the Commonwealth Government does insist in its public statements that the policy settings will allow it to do so).<sup>72</sup> The biggest criticism of the ERF is that while it allows the Commonwealth to purchase abatement, the policy does not put an overall cap on emissions in the whole economy.<sup>73</sup> This means that gains achieved by the ERF in reducing emissions can be undermined by activity elsewhere in the economy. For instance, recent relaxations to land clearing restrictions in Queensland have seen an increase in clearing, which is likely to have a material effect upon Australia's ability to meet its international targets.<sup>74</sup>

As 195 countries have now agreed to the terms of the new international Paris Agreement on Climate Change, and several of these have made commitments towards that Agreement, it will be important that domestic legislative frameworks, including those relating to forest carbon, assist countries to implement their commitments.

## 2. Consider How Constitutional and Property Laws Impact Treatment of Carbon, and Whether Such Legal Frameworks Can Be Used to Support a Right to Carbon

Creating a legal framework which allows for individuals and entities to develop and protect rights to car-

bon may be a new concept for many legal systems. However, in developing this framework, policymakers ought to consider the ways that such a framework can be introduced within existing legal frameworks.

Policymakers need to be conscious of the fact that developing a legal framework for carbon rights requires creating a framework for such rights distinct to the land and forestry rights which underlie them. In some cases this will be adding to existing legal frameworks on land and forestry, and in others creating an entirely new legislative framework. This decision depends on the legal system into which the rights are being created and the extent of the existing frameworks.

The NSW GGAS scheme introduced forest carbon rights into a common law jurisdiction, taking advantage of common law property principles. A Carbon Sequestration Right in NSW is a right equated to a *profit a prendre*, which is a historical property law concept used to grant harvesters or hunters the right to enter land and take certain benefits from that land. Although the analogy is not perfect (as a Carbon Sequestration Right is a right to keep something on the land rather than take it off), the ability to register a Carbon Sequestration Right on land title allows the right to carbon to be dealt with separately to the underlying right to land or forests. A forestry right noted on the register does not have to be noted as an encumbrance, nor is the consent of the party benefiting from the forestry right required.

Australia also provides a good example of the way in which policymakers took account of existing indigenous land rights in designing the forest rights framework. The ERF requires that land on which native title has not been extinguished is allocated to a project proponent through a registered ILUA, which is largely enforceable as a contract. ILUAs can include terms on native title holders agreeing to a future development; how native title rights coexist with the rights of other people; access to an area; extinguishment of native title and compensation, among other things. Allowing the use of a contractual instrument, as a work-around to requiring project proponents to have undisputed land rights, does create some flexibility while ensuring that rights to forest carbon are only provided to project proponents in full knowledge by such indigenous groups.

72 The Hon. Greg Hunt MP, Minister for the Environment, 'Safeguard mechanism will support emissions reduction' (2016) <<http://www.environment.gov.au/minister/hunt/2016/mr20160406a.html>> accessed 4 July 2016.

73 For more Information: Reputex Carbon Analytics Australia, 'Emissions Trading Versus Direct Action: Achieving Australia's Emissions Reduction Objectives' (August 2013) <[http://awsassets.wwwf.org.au/downloads/fs068\\_emissions\\_trading\\_versus\\_direct\\_action\\_30aug13.pdf](http://awsassets.wwwf.org.au/downloads/fs068_emissions_trading_versus_direct_action_30aug13.pdf)> accessed 4 July 2016.

74 'CO2 Australia Tree Clearing in Australia - Its Contribution to Climate Change' (February 2016) <<http://www.wilderness.org.au/sites/default/files/PDFS/CO2%20Lead%20Report.pdf>> accessed 4 July 2016.

### 3. Consider Permanence Requirements

Each of the schemes of Australia and New Zealand has different permanence requirements. The approach they have taken depends in part on the purpose of the scheme. For instance, the purpose of the NZ ETS is to ensure that future emissions from deforestation are de-incentivised, whereas the PFSI is about ensuring that forests can be used as a sink in the longer term. Accordingly, the permanence requirements under the PFSI are longer term than those under the NZ ETS.

Additionally, it is important for policymakers to consider how the policy framework will buffer against a risk of permanence failure, such as wild fires. In this regard, the NSW Pooled Buffer approach, borrows from some voluntary carbon standards - such as the Verified Carbon Standard - in creating a shared pool of carbon credits into which all projects must contribute.<sup>75</sup> This pooled buffer account acts as a form of 'insurance' from which projects can draw in the event of a permanence failure.

### 4. Additionality and Newness of Projects

Finally, a key feature of the New Zealand and Australian forest carbon schemes is ensuring that the policy frameworks incentivise new conservation that would not have happened but-for the policy.

Under the New Zealand and Australian schemes, additionality is regulated through the eligibility requirements of forests under the scheme. They prevent carbon credits to be generated from forests which would have been planted notwithstanding the existence of the policy framework. This is an important consideration to ensure that any emission reductions generated are real.

### 5. Bilateralism in Political Approach to Climate Change

Finally, in addition to the technical points above, it is important for policymakers to take account of the

political dynamics involved in climate change in the country. Australia's effective CEF climate policy regime, supported by the CFI, was shown to effectively reduce emissions without harming economic growth.<sup>76</sup>

However, notwithstanding an effective climate and forest carbon policy framework, this policy framework was repealed. The reasons for this are related to poor management of the political dynamics around climate change by the ALP in Australia. The then government referred to the carbon pricing elements of the policy framework as a 'carbon tax', adding fuel to a vitriolic attack by the opposition, and playing a significant role in the demise of the government. Therefore, in addition to the technical forest carbon elements, policymakers should be cognisant of trying to introduce forest carbon schemes in contexts where climate politics are not so divisive.

## V. Conclusion

Australia and New Zealand, countries with a small population and isolated in geography, do have some important lessons for the world's policymakers in respect of forest carbon. As countries across the world look to introduce policy frameworks which incentivise forest carbon abatement, such as REDD+, Australia and New Zealand's successful and tested policy frameworks contain important lessons from which others can draw. Particularly important are the approaches these countries have taken to creating a tradeable right to forest carbon separate to underlying land and forest rights, and protecting additionality and permanence provide positive lessons to which policymakers can draw.

75 For more information, please refer to 'Verified Carbon Standard' <<http://www.v-c-s.org/project/vcs-program/>> accessed 4 July 2016.

76 Frank Jotzo, 'Australia's Clean Energy Future' <[https://ccep.crawford.anu.edu.au/sites/default/files/uploads/ccep\\_crawford\\_anu\\_edu\\_au/2014-02/australia-clean-energy-future-environmental-finance-2011.pdf](https://ccep.crawford.anu.edu.au/sites/default/files/uploads/ccep_crawford_anu_edu_au/2014-02/australia-clean-energy-future-environmental-finance-2011.pdf)> accessed 4 July 2016.