



Australian Government
Clean Energy Regulator

**EMISSIONS
REDUCTION
FUND**

Project Resource 1: State and territory land law and summary of land rights law

This resource forms part of the Native title, legal right and eligible interest-holder consent guidance.

Released June 2018



Project Resource 1: State and territory land law and summary of land rights law

Each state and territory has its own land tenure (or land use) legislation. The types of Emissions Reduction Fund project activities are permitted under this legislation will depend on the jurisdiction and tenure type (e.g. leased land, freehold and crown land).

Figure 1 shows the range of different registered area-based Emissions Reduction Fund projects across Australia in each jurisdiction. Refer to the Emissions Reduction Fund project register¹ for more information on current projects.

How are state and territory legal obligations relevant when registering an Emissions Reduction Fund project?

Project proponents will need to demonstrate to the Clean Energy Regulator that they have considered whether any state or territory legal obligations need to be satisfied to conduct project activities, and where applicable, that they have complied with these obligations.

Emissions Reduction Fund project activities may be permitted under current land tenure arrangements. However, this will depend on the specific methodology, size, location and tenure type. In some circumstances, amending the terms and conditions of a lease (to obtain the legal right to undertake a project) could be a future act under the Native Title Act 1993² (Native Title Act).

State and territory land law

States and territories have contributed to the development of the guidance below by providing general information about land law in the relevant jurisdiction. Some information is still being developed with the relevant jurisdiction. Jurisdiction information is not standardised as it has been based on information provided by each state and territory at the time of guidance development.

Project proponents are advised to seek additional advice as part of their due diligence before commencing a project to ensure they have the legal right to carry out the project under state or territory law and have obtained all relevant consents and regulatory approvals.

Land rights legislation

In addition to native title law and state and territory land law, projects may be affected by 'land rights' law. Native title and land rights can sometimes exist on the same land, but the two systems are different. They involve different laws and processes and provide different rights.

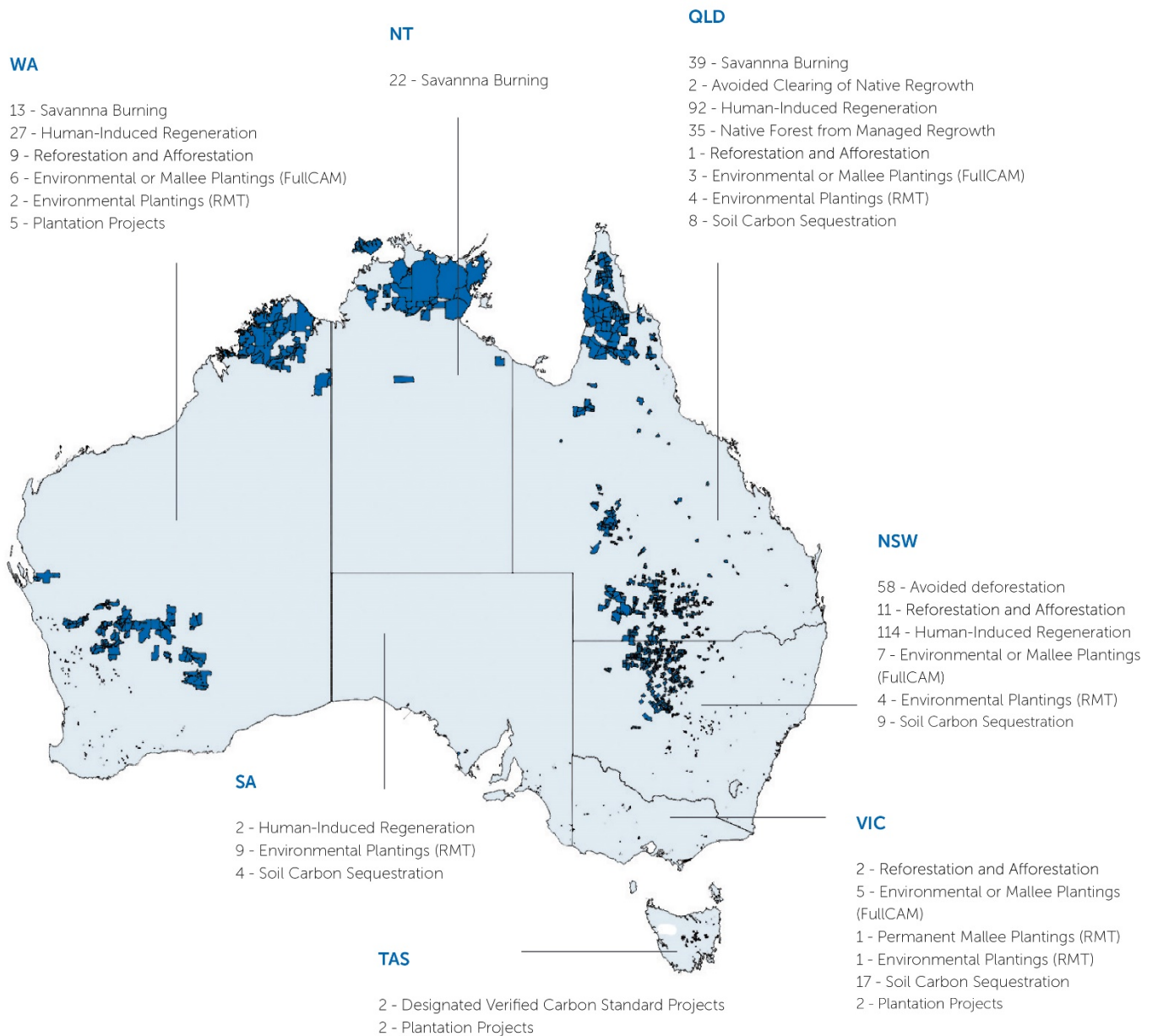
Broadly speaking, the term 'land rights land' is used to cover various interests in land that are held by or on behalf of Aboriginal people and Torres Strait Islanders. It is covered by Commonwealth and state and territory legislation. In the context of the Emissions Reduction Fund, the term 'land rights land' is defined in section 5 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*³ (CFI Act). Project proponents need to examine the certificate of title or Crown land record for the parcel of land where they intend to carry out an Emissions Reduction Fund project, and should seek advice about the possible application and effect of these laws where applicable.

¹ <http://www.cleanenergyregulator.gov.au/ERF/project-and-contracts-registers/project-register>

² <https://www.legislation.gov.au/Series/C2004A04665>

³ <https://www.legislation.gov.au/Series/C2011A00101>

Figure 1: Area-based Emissions Reduction Fund projects currently in each jurisdiction as at 31 May 2018⁴



⁴ <http://www.cleanenergyregulator.gov.au/ERF/project-and-contracts-registers/project-register/project-mapping-files>

Australian Capital Territory

In the Australian Capital Territory (ACT), most of the land is leasehold. Leasehold is a system of land tenure where one buys the right to use the land under a lease for a maximum term of 99 years. Each lease sets out the obligations of the lessee and the purpose for which the land can be used.

A Crown lease can be registered for a duration of less than 12 months. The majority of residential leases are for 99 years, and the duration of a rural or commercial lease can vary from one to 99 years. A lessee can make an application for a further Crown lease at any time during the term of their lease. Further leases can be granted provided neither the territory nor the Commonwealth needs the land. In deciding to grant a further lease, consideration is given to whether the land is required for a public purpose. If so, the further lease would not be granted.

Additional information

If the proposed Emissions Reduction Fund activity is not an activity permitted under the existing lease arrangements, please contact the ACT Government via their website⁵ or phone 13 22 81 to seek advice.

If any proposed Emissions Reduction Fund project activity changes the prime activity of a lease, there may also need to be a Development Application (an environmental impact assessment process). For more information, please see the ACT Planning website⁶.

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*⁷ (Cth) vested land in the Jervis Bay area in the Wreck Bay Aboriginal Community Council. In 2001, the ACT Government and the Ngunnawal People entered into a joint management agreement for the Namadgi National Park.

⁵ <http://www.act.gov.au/contact-us>

⁶ https://www.planning.act.gov.au/development_applications

⁷ <https://www.legislation.gov.au/Series/C2004A03405>

Western Australia

The Western Australian Government will provide in-principle support for a number of pilot sequestration offset projects undertaken by pastoralists where they meet a set of criteria, including a focus on grazing strategies to increase vegetation and remove carbon dioxide from the atmosphere.

For more information, please refer to the WA Department of Primary Industries and Regional Development website⁸.

Western Australia land rights legislation

There was no Indigenous land claims procedure in Western Australia before the Native Title Act was passed in 1993. The *Aborigines Act 1889*⁹ (WA) permitted the Governor to reserve Crown lands for Aboriginal people. The Aboriginal Lands Trust holds these lands on trust, but title remains with the Crown.

⁸ <https://www.agric.wa.gov.au/carbon-farming/carbon-farming-potential-pastoralists>

⁹ https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_10142_homepage.html

New South Wales

In New South Wales (NSW), approximately 42 per cent of the state's land is located in the Western Division of NSW. Approximately 90 per cent of that area is covered by leases issued under the *Western Lands Act 1901*¹⁰ (NSW) (Western Lands Act). These leases are known as 'Western Lands leases'. The other 10 per cent of land in the Western Division mainly consists of National Parks, freehold land, urban leases, transport and services easements.

Parties looking to run a project in NSW should contact their local council as zoning and local government authority plans may affect the legal right to carry out an Emissions Reduction Fund project.

Western Land leases

Western Land leases¹¹ are granted under the **Western Lands Act**. Most of these leases are perpetual (have no end date) and are for a designated purpose such as grazing and agriculture. The types of Emissions Reduction Fund activities that are permitted on these lands will depend on the purpose and terms of the lease over that particular piece of land.

Permitted Emissions Reduction Fund methods and activities

Some Emissions Reduction Fund project activities are considered to be general lease purposes and would be permitted without having to alter the lease purpose or conditions. These include the following Emissions Reduction Fund project methods and associated project activities:

- Native forest from managed regrowth, and human-induced regeneration methods
 - » Manage the timing, and the extent, of livestock grazing
 - » Manage, in a humane manner, feral animals
 - » Management of plants that are not native to the project area
 - » Cessation of mechanical or chemical destruction, or suppression, of regrowth
- Estimating sequestration of carbon in soil using default values method
 - » Nutrient management
 - » Soil acidity management
 - » Pasture renovation
 - » Stubble retention

There are also some Emissions Reduction Fund project activities that may be permitted under a Western Land lease but the lessee would first have to check the terms of their lease before commencing the activity. These activities include:

- Sequestering carbon in soils in grazing systems method
 - » Change the land use from continuous cropping to permanent pasture
 - » Undertake pasture cropping
 - » Management of the pasture

If an Emissions Reduction Fund project activity is outside the lease purpose, or considered to be so, a project proponent must apply to the NSW Department of Industry to alter the lease purpose or lease conditions. The following Emissions Reduction Fund project methods and its associated project activities will require a lease variation:

- Estimating sequestration of carbon in soil using default values method
 - » New irrigation
- Measurement based methods for new farm forestry plantations
 - » Establishment of a permanent planting
 - » Establishment of a new farm forestry plantation
- Reforestation and afforestation and reforestation by environmental or mallee plantings methods
 - » Planting permanent mixed-species trees
 - » Permanent mallee plantings
- Plantation forestry method
 - » Establish a new plantation forest
 - » Convert a short-rotation plantation to a long-rotation plantation

Freehold

If a project proponent is the owner of freehold land in NSW, they should contact their local council, because zoning and Local Government Authority Plans may affect the legal right to carry out an Emissions Reduction Fund project.

¹⁰ <https://www.legislation.nsw.gov.au/#/view/act/1901/70/full>

¹¹ https://www.industry.nsw.gov.au/_data/assets/pdf_file/0004/145543/Western-lands-leases-tenures-and-conditions.pdf

The Native Title Act in NSW

Native title is deemed to have been extinguished on Western Lands grazing leases that were granted in perpetuity prior to 23 December 1996. If native title in the land has not been extinguished, then any proposed land use that is not consistent with the purpose of the lease must satisfy the future act provisions¹² of the Native Title Act.

plantation or reforestation/afforestation Emissions Reduction Fund projects in NSW, before applying to register the project with the Clean Energy Regulator.

Carbon sequestration projects cannot occur on land that is subject to a 'term lease'.

Additional information

Further information is available by contacting the NSW Department of Industry—Crown Lands and Water Division by phone 02 6883 5400 or email clwestern.region@crowlandnsw.gov.au.

New South Wales land rights legislation

The *Aboriginal Land Rights Act 1983*¹³ (NSW) allows Indigenous land councils to claim certain Crown land on behalf of Aboriginal people. If an Indigenous land council wishes to sell land, it must seek a native title determination that native title does not exist in the area. Most of New South Wales is subject to extinguishing tenures and therefore there are limited areas for recognising native title.

¹² <https://www.legislation.nsw.gov.au/#/view/act/1983/42>

¹³ <https://legislation.nt.gov.au/Legislation/PASTORAL-LAND-ACT>

Northern Territory

In the Northern Territory (NT), approximately 50 per cent of the land is Aboriginal land, and pastoral leases cover approximately 46 per cent of the territory.

Pastoral leases

The majority of pastoral leases in the NT are perpetual (i.e. they have no end date). The remaining pastoral leases are 'term leases' that allow the land to be used for 'pastoral purposes' for a set timeframe. Pastoral leases are administered under the *Pastoral Land Act*¹³ (NT) where the term 'pastoral purposes' is defined to mean 'the pasturing of stock for sustainable commercial use of the land on which they are pastured'. Pastoral leases can range in size from 200km² to 12 000km².

Pastoral activities in the Northern Territory are based upon the grazing of native pasture species. Carrying capacities of leases are calculated on the amount and type of un-supplemented native pastoral species.

Permitted Emissions Reduction Fund methods and activities

Under NT legislation, a pastoral leaseholder ('lessee') is permitted to implement the following Emissions Reduction Fund methods and their associated project activities:

- Native forest from managed regrowth, and human-induced regeneration methods
 - » Manage the timing, and the extent, of livestock grazing
 - » Manage, in a humane manner, feral animals
 - » Management of plants not native to the project area
 - » Cessation of mechanical or chemical destruction, or suppression, of regrowth
- Estimating sequestration of carbon in soil using default values method
 - » Nutrient management
 - » Soil acidity management
 - » New irrigation
 - » Pasture renovation

¹³ <https://legislation.nt.gov.au/Legislation/PASTORAL-LAND-ACT>

Savanna fire management methods

- Used as a land management tool

All of these activities are considered to be pastoral activities under NT pastoral leases legislation.

When is a non-pastoral use permit required?

If a pastoral lessee wants to undertake an activity that is not part of the permitted pastoral purposes of their lease, the lessee will be required to obtain a non-pastoral use permit from the NT Government. The establishment of any forestry/permanent planting activity will require this permit and leaseholders must apply to the Northern Territory Pastoral Land Board¹⁴ before registering their Emissions Reduction Fund project. Non-pastoral use applications must relate to 49 per cent or less of the overall land size—that is, the non-pastoral purpose must not be the dominant purpose of the land. A Land Use Agreement is also required. See section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976*¹⁵ (Cth) (Aboriginal Land Rights Act).

Project proponents may need to obtain a non-pastoral use permit if they are planning to carry out a project using any of the Emissions Reduction Fund methods listed below.

Measurement-based methods for new farm forestry plantations

- Establishment of a permanent planting
 - Establishment of a new farm forestry plantation
- Reforestation and afforestation by environmental or mallee plantings methods

- Planting of permanent mixed-species trees
- Permanent mallee plantings

Plantation forestry method

- Establishing a new plantation forest
- Converting a short-rotation plantation to a long-rotation plantation

All pastoral leases that co-exist with native title in Northern Territory must comply with section 24GB of the Native Title Act. This requirement is the same for all states and territories, not just the Northern Territory.

For more information contact pastorallandboard@nt.gov.au

¹⁴ <https://legislation.nt.gov.au/Legislation/PASTORAL-LAND-ACT>

¹⁵ <https://www.legislation.gov.au/Details/C2016C00111>

¹⁶ <http://www.clc.org.au/articles/info/the-aboriginal-land-rights-act>

Northern Territory land rights legislation

The Aboriginal Land Rights Act (NT) recognises the Aboriginal system of land ownership and provides for the concept of inalienable freehold title. Communal title is formally vested in Aboriginal land trusts comprising Aboriginal people who hold the title on trust for the benefit of all the traditional landowners. The land is not held by Indigenous land councils and the NT Government cannot compulsorily acquire the land. Only unalienated Crown land (land that no-one else is using or has an interest in) or land which is wholly owned by Aboriginal people may be claimed. Further details are available on the Central Land Council website¹⁶.

A successful land claim requires the Aboriginal landowners to prove their traditional relationship to the land under claim. This involves extensive research by anthropologists, and the claimants providing evidence before the Aboriginal Land Commissioner who is a judge of the Federal Court or the Supreme Court in the NT.

Anyone wishing to register an Emissions Reduction Fund project in NT on land subject to the Aboriginal Land Rights Act (NT) must provide evidence to the Clean Energy Regulator that legal requirements under the legislation have been satisfied. This includes the registration of a section 19 agreement under the Aboriginal Land Rights Act (NT). A section 19 agreement is negotiated between a proponent, the relevant Indigenous land council for the area, and all land trusts in the area. It grants the right to conduct activities on Aboriginal land rights land. The section 19 agreement process is outlined below:

1. The proponent registers an expression of interest with the land council that has jurisdiction over the project area.
2. The proponent and the land council negotiate the terms of the section 19 agreement.
3. The land council identifies the appropriate land trusts, traditional owners, and affected groups and undertakes consultation regarding the proposed agreement.
4. The land council drafts the section 19 agreement.
5. The section 19 agreement is signed by the proponent, the land council executive, and any relevant land trusts.

The four land councils in the NT are the Northern Land Council, the Central Land Council, the Tiwi Land Council and the Anindilyakawa Land Council.

Proponents should contact the relevant land council for information relating to the timeline and cost of obtaining a section 19 agreement as they may vary significantly depending on the number of consultations, area, and distance. Proponents are encouraged to begin enquiries into these arrangements as early as possible to minimise legal right issues.

Queensland

In Queensland (Qld), the legal right to carry out an Emissions Reduction Fund project is regulated under state land use laws, including the *Land Act 1994*¹⁷ (Land Act) (Qld), *Forestry Act 1959*¹⁸ (Forestry Act) (Qld), *Land Title Act 1994*¹⁹ (Land Title Act) (Qld) and the *Nature Conservation Act 1992*²⁰ (Qld). The legal right can flow from:

- rights under the existing tenure, or
- a right to deal in carbon abatement product under the Forestry Act (Qld).

A carbon abatement interest is an interest in the land consisting of the exclusive right of the economic benefits associated with carbon sequestration on the land. It can also be registered against the title under the Land Act (Qld) (non-freehold land) and under the Land Title Act (Qld) (for freehold land).

In relation to eligible interest-holder consent over leasehold land, the Minister responsible for Crown lands in Queensland (currently the Minister for Natural Resources, Mines and Energy) may provide eligible interest-holder consent for Emissions Reduction Fund projects that are supported on land under the Land Act (Qld). When considering whether to provide eligible interest-holder consent under the CFI Act, the Minister will consult with the Department of Agriculture and Fisheries (Qld) about whether a carbon abatement project may impact the state's access to quarry material and vegetation (forest products).

Land Act 1994 (Qld)

The Land Act (Qld) plays a key role, as about 60 percent of land in Queensland is administered or managed under the Land Act. About 30 percent of the state is held as freehold land, which is not subject to the Land Act.

The chief executive of the Queensland Department of Natural Resources, Mines and Energy and the Minister for Natural Resources, Mines and Energy are responsible for land under the Land Act.

The Department of Natural Resources, Mines and Energy supports carbon projects on term leases, perpetual leases and freeholding leases issued for primary production purposes, where the specific conditions of the lease would still be complied with and other state interests are not impacted.

Under the Land Act, the lessee must only use the land for the purpose for which the tenure was issued.

The requirements for carbon sequestration projects and emission avoidance projects are as follows:

Term and perpetual leases

- Eligible interest-holder consent from the Minister for Natural Resources, Mines and Energy as required under the CFI Act.
- The proponent may opt to register their exclusive right of the economic benefits associated with the project by registering a carbon abatement interest.
- Under the Land Act the lessee of leasehold land must only use the land for the purpose for which the lease was issued.
- The Department of Natural Resources, Mines and Energy encourages proponents to discuss options to extend lease terms where the Emissions Reduction Fund project length is longer than the term of the current lease.

Freeholding leases

- Eligible interest-holder consent from the Minister for Natural Resources, Mines and Energy as required under the CFI Act.
- If the proponent does not wish to register a carbon abatement interest under the Land Act, the Department of Natural Resources, Mines and Energy recommends they make final payment of monies to allow for the deed of grant to issue, as the project can then be dealt with as freehold.

Land Title Act 1994 (Qld)

- Eligible interest-holder consent is required from the freehold title holder as required under the CFI Act.
- However note that where there is a forest consent area or a forest entitlement area on freehold land, the State owns the forest products (i.e. the vegetation), and therefore the carbon rights, on these areas, and therefore eligible interest-holder consent is also required from the Department of Agriculture and Fisheries on behalf of the State.

Forestry Act 1959 (Qld)

The Department of Natural Resources, Mines and Energy will contact the Department of Agriculture and Fisheries for Emissions Reduction Fund projects on leasehold land under the Land Act to determine whether an Emissions Reduction Fund project may impact the State's access to quarry material and forest products (i.e. vegetation) under the Forestry Act (Qld).

Where a forest consent area is registered as a 'profit à prendre'²¹ on title or where a forest entitlement area is an exclusion on title, the state owns the carbon, not the landholder, and project proponents need to contact the Department of Agriculture and Fisheries to discuss the project.

¹⁷ <https://www.legislation.qld.gov.au/view/html/inforce/2018-03-31/act-1994-081>

¹⁸ <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1959-058>

¹⁹ <https://www.legislation.qld.gov.au/view/html/inforce/2018-01-01/act-1994-011>

²⁰ <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1992-020>

²¹ A profit à prendre is a right to take part of the natural produce grown on land or part of the soil, earth or rock comprising the land, owned by another person.

Other approvals

The project proponent may need to obtain other permits and approvals for an Emissions Reduction Fund project under state legislation, including, for example, the *Planning Act 2016* (Qld).

The Native Title Act in Queensland

Where native title continues to exist, the proponent must ensure that native title is addressed for an Emissions Reduction Fund project under the Native Title Act.

Additional information

More information on eligible interest-holder consent, seeking a right to deal in the carbon abatement product, or registering a carbon abatement interest on State land can be found on the Queensland Government website²².

The Queensland Government recommends that all Emissions Reduction Fund applicants on state land should contact the Department of Natural Resources, Mines and Energy prior to registering an Emissions Reduction Fund project. This is to ensure that potential issues and options for resolution are identified early. All applications will be assessed on a case-by-case basis.

For state land enquiries, the Department of Natural Resources, Mines and Energy may be contacted by phone on (07) 4447 9164 or email SLAMlodgement@dnrme.qld.gov.au.

An applicant can apply for the grant of a right to deal with carbon abatement product under the Forestry Act (Qld). The process for lodging an application can be found in the fact sheet "Department of Agriculture and Fisheries Involvement in Emissions Reduction Fund Projects"²³

For Forestry Act enquiries, the Department of Agriculture and Fisheries may be contacted by phone on 13 25 23 or email forestproducts@daf.qld.gov.au.

Queensland land rights legislation

The Aboriginal Land Act (Qld) and *Torres Strait Islander Land Act 1991*²⁴ (Qld) were introduced to transfer land (including the existing community lands and some lands reserved for particular purposes) to Aboriginal or Torres Strait Islander people. This is to enable the management of land according to their traditions or customs on behalf of, and for the benefit of, the broader Aboriginal or Torres Strait Islander group.

²² <http://www.qld.gov.au/environment/land/state/use/carbon-rights>

²³ <https://www.daf.qld.gov.au/forestry/state-native-forestry/emissions-reduction-fund-projects>

²⁴ <https://www.legislation.qld.gov.au/view/asmade/act-1991-033>

Tasmania

In Tasmania, the types of land tenure include Crown land and freehold land. Crown owned land includes Crown land managed under the *Crown Lands Act 1976*²⁵ (Tas) and reserved land managed under the *National Parks and Reserves Management Act 2002*²⁶ (Tas). The Parks and Wildlife Service (PWS) manages the majority of Crown land in Tasmania. Crown land may also be managed by other Government Departments and agencies as portfolio land for a specific purpose or objective (e.g. Department of State Growth manages land in relation to the state's road network).

Crown land

The licences or leases on Crown owned land in Tasmania will outline what activities are permitted on the land. If a Crown land agreement holder wants to change the permitted activities, such as undertaking an Emissions Reduction Fund project activity, they should contact PWS by email cls.enquiries@dpiwve.tas.gov.au to discuss the matter. If another Government department manages the land the PWS will direct the enquiry to the relevant managing department.

Freehold land

Anyone proposing to implement a project on freehold land should talk to the local council for the project area to ensure the activity meets any government requirements.

Tasmania land rights legislation

The *Aboriginal Lands Act 1995*²⁷ (Tas) vested 12 areas in the Indigenous land council of Tasmania to be held on trust for the benefit of Aboriginal people. It did not establish a claims process.

²⁵ <http://www.qld.gov.au/environment/land/state/use/carbon-rights>

²⁶ <https://www.daf.qld.gov.au/forestry/state-native-forestry/emissions-reduction-fund-projects>

²⁷ <https://www.legislation.qld.gov.au/view/asmade/act-1991-033>

South Australia

In South Australia (SA), the majority of land is freehold, unalienated Crown land, or held under a Crown lease or other arrangement.²⁸

Freehold land

Projects conducted on freehold land require the consent of the freehold title holder.

Anyone proposing to implement a project on freehold land should contact the local council for the project area to ensure the activity meets the relevant Development Plan's zoning requirements under the *Development Act 1993*²⁹ (Development Act) (SA). They should also contact the Department of Environment, Water and Natural Resources (SA) to determine if a water affecting activity permit is required under the *Natural Resources Management Act 2004*³⁰ (SA).

Crown land

The South Australian Government manages Crown land under the *Crown Lands Management Act 2009* (SA). There are a number of different Crown land leases in South Australia, which include:

- Miscellaneous term leases—for grazing and cropping, personal residence, aquaculture. Miscellaneous leases cover a variety of purposes, and terms and conditions can be varied to suit the lessor and lessee.
- Perpetual leases—grazing and cropping.
- Conservation leases.
- Conservation park leases.

Other leasehold land tenure in South Australia includes:

- Pastoral leases—under the *Pastoral Land Management and Conservation Act 1989*³¹ (SA).
- National Park leases—under the *National Parks and Wildlife Act 1972*³² (SA).
- Forestry leases and licences—under the *Forestry Act 1950*³³ (SA).

Leased land grants the lessee the right to occupy and use the land as stipulated in the terms and conditions of the lease.

Undertaking Emissions Reduction Fund projects on leased land

The legal right to undertake any Emissions Reduction Fund project activity on land in South Australia will be determined by the terms and conditions of the lease, which vary by lease type.

Not all Emissions Reduction Fund activities may be considered a change of land use. The lessee will have the right to conduct project activities if they are consistent with the terms of their lease.

Any changes to the lease conditions will require the lease approval process to be recompleted. For Crown or pastoral land, the Minister for Sustainability, Environment and Conservation or a delegate is responsible for approving Crown leases, pastoral leases, and any variations to lease terms and conditions.

Note that pastoral lease conditions may specify land use requirements (e.g. minimum stocking rates). Any changes to the listed use—which may be required for an Emissions Reduction Fund project—would require the approval of the Minister or the Pastoral Board of South Australia³⁴.

²⁸ https://www.environment.sa.gov.au/files/sharedassets/public/crown_lands/fact_sheets/crown-land-what-is-it-fact.pdf

²⁹ <https://www.legislation.sa.gov.au/LZ/C/A/DEVELOPMENT%20ACT%201993.aspx>

³⁰ <https://www.legislation.sa.gov.au/LZ/C/A/Natural%20Resources%20Management%20Act%202004.aspx>

³¹ <https://www.legislation.sa.gov.au/LZ/C/A/Pastoral%20Land%20Management%20and%20Conservation%20Act%201989.aspx>

³² <https://www.daf.qld.gov.au/forestry/state-native-forestry/emissions-reduction-fund-projects>

³³ <https://www.legislation.sa.gov.au/LZ/C/A/FORESTRY%20ACT%201950.aspx>

³⁴ <http://www.naturalresources.sa.gov.au/aridlands/pastoral-board>

If there is a material change in land use, a development application may be required under the Development Act (SA) and the *Planning Development and Infrastructure Act 2016*³⁵ (SA). Proponents should consult with the Department for Planning, Transport and Infrastructure (SA) or the local council to determine if additional approvals are required.

Activities or land use may also be subject to other regulatory regimes, such as the Development Act (SA), *Native Vegetation Act 1991*³⁶ (SA), *Coastal Protection Act 1972*³⁷ (SA), *Environment Protection Act 1993*³⁸ (SA), *Mining Act 1971*³⁹ (SA) and the *Petroleum and Geothermal Energy Act 2000*⁴⁰ (SA). Commonwealth legislation such as the Native Title Act and the *Environment Protection and Biodiversity Conservation Act 1999*⁴¹ (Cth) may also apply.

For enquiries about legislative requirements on land in South Australia, please contact the Crown Land Program on (08) 8463 6856.

The Native Title Act in South Australia

For projects on native title land, it is likely that Emissions Reduction Fund project activities could constitute a future act. Further legal advice should be sought for each specific case.

South Australia land rights legislation

In 1966, South Australia transferred control of land reserved for Aboriginal people to the Aboriginal Lands Trust. Land rights were acknowledged in the *Pitjantjatjara Land Rights Act 1981*⁴² (SA) and *Maralinga Tjarutja Land Rights Act 1984*⁴³ (SA).

³⁵ <https://www.legislation.sa.gov.au/LZ/C/A/Planning%20Development%20and%20Infrastructure%20Act%202016.aspx>

³⁶ <https://www.legislation.sa.gov.au/LZ/C/A/Native%20Vegetation%20Act%201991.aspx>

³⁷ <https://www.legislation.sa.gov.au/LZ/C/A/COAST%20PROTECTION%20ACT%201972.aspx>

³⁸ <https://www.legislation.sa.gov.au/LZ/C/A/ENVIRONMENT%20PROTECTION%20ACT%201993.aspx>

³⁹ <https://www.legislation.sa.gov.au/LZ/C/A/MINING%20ACT%201971.aspx>

⁴⁰ <https://www.legislation.sa.gov.au/LZ/C/A/PETROLEUM%20AND%20GEOTHERMAL%20ENERGY%20ACT%202000.aspx>

⁴¹ <https://www.legislation.gov.au/Series/C2004A00485>

⁴² <https://www.legislation.sa.gov.au/LZ/C/A/ANANGU%20PITJANTJATJARA%20YANKUNYJTJATJARA%20LAND%20RIGHTS%20ACT%201981.aspx>

⁴³ <https://www.legislation.sa.gov.au/lz/c/a/maralinga%20tjarutja%20land%20rights%20act%201984.aspx>

Queensland

In Queensland (Qld), the legal right to carry out an Emissions Reduction Fund project is regulated under state land use laws, including the *Land Act 1994*⁴⁴ (Land Act) (Qld), *Forestry Act 1959*⁴⁵ (Forestry Act) (Qld), *Land Title Act 1994*⁴⁶ (Land Title Act) (Qld) and the *Nature Conservation Act 1992*⁴⁷ (Qld). The legal right can flow from:

- rights under the existing tenure, or
- a right to deal in carbon abatement product under the Forestry Act (Qld).

A carbon abatement interest is an interest in the land consisting of the exclusive right of the economic benefits associated with carbon sequestration on the land. It can also be registered against the title under the Land Act (Qld) (non-freehold land) and under the Land Title Act (Qld) (for freehold land).

In relation to eligible interest-holder consent over leasehold land, the Minister responsible for Crown lands in Queensland (currently the Minister for Natural Resources, Mines and Energy) may provide eligible interest-holder consent for Emissions Reduction Fund projects that are supported on land under the Land Act (Qld). When considering whether to provide eligible interest-holder consent under the CFI Act, the Minister will consult with the Department of Agriculture and Fisheries (Qld) about whether a carbon abatement project may impact the state's access to quarry material and vegetation (forest products).

Land Act 1994 (Qld)

The Land Act (Qld) plays a key role, as about 60 percent of land in Queensland is administered or managed under the Land Act. About 30 percent of the state is held as freehold land, which is not subject to the Land Act.

The chief executive of the Queensland Department of Natural Resources, Mines and Energy and the Minister for Natural Resources, Mines and Energy are responsible for land under the Land Act.

The Department of Natural Resources, Mines and Energy supports carbon projects on term leases, perpetual leases and freeholding leases issued for primary production purposes, where the specific conditions of the lease would still be complied with and other state interests are not impacted.

Under the Land Act, the lessee must only use the land for the purpose for which the tenure was issued.

The requirements for carbon sequestration projects and emission avoidance projects are as follows:

⁴⁴ <https://www.legislation.qld.gov.au/view/html/inforce/2018-03-31/act-1994-081>

⁴⁵ <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1959-058>

⁴⁶ <https://www.legislation.qld.gov.au/view/html/inforce/2018-01-01/act-1994-011>

⁴⁷ <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1992-020>

Term and perpetual leases

- Eligible interest-holder consent from the Minister for Natural Resources, Mines and Energy as required under the CFI Act.
- The proponent may opt to register their exclusive right of the economic benefits associated with the project by registering a carbon abatement interest.
- Under the Land Act the lessee of leasehold land must only use the land for the purpose for which the lease was issued.
- The Department of Natural Resources, Mines and Energy encourages proponents to discuss options to extend lease terms where the Emissions Reduction Fund project length is longer than the term of the current lease.

Freeholding leases

- Eligible interest-holder consent from the Minister for Natural Resources, Mines and Energy as required under the CFI Act.
- If the proponent does not wish to register a carbon abatement interest under the Land Act, the Department of Natural Resources, Mines and Energy recommends they make final payment of monies to allow for the deed of grant to issue, as the project can then be dealt with as freehold.

Land Title Act 1994 (Qld)

- Eligible interest-holder consent is required from the freehold title holder as required under the CFI Act.
- However note that where there is a forest consent area or a forest entitlement area on freehold land, the State owns the forest products (i.e. the vegetation), and therefore the carbon rights, on these areas, and therefore eligible interest-holder consent is also required from the Department of Agriculture and Fisheries on behalf of the State.

Forestry Act 1959 (Qld)

The Department of Natural Resources, Mines and Energy will contact the Department of Agriculture and Fisheries for Emissions Reduction Fund projects on leasehold land under the Land Act to determine whether an Emissions Reduction Fund project may impact the State's access to quarry material and forest products (i.e. vegetation) under the Forestry Act (Qld).

Where a forest consent area is registered as a 'profit à prendre'⁴⁸ on title or where a forest entitlement area is an exclusion on title, the state owns the carbon, not the landholder, and project proponents need to contact the Department of Agriculture and Fisheries to discuss the project.

⁴⁸ A profit à prendre is a right to take part of the natural produce grown on land or part of the soil, earth or rock comprising the land, owned by another person.

Other approvals

The project proponent may need to obtain other permits and approvals for an Emissions Reduction Fund project under state legislation, including, for example, the *Planning Act 2016* (Qld).

The Native Title Act in Queensland

Where native title continues to exist, the proponent must ensure that native title is addressed for an Emissions Reduction Fund project under the Native Title Act.

Additional information

More information on eligible interest-holder consent, seeking a right to deal in the carbon abatement product, or registering a carbon abatement interest on State land can be found on the Queensland Government website⁴⁹.

The Queensland Government recommends that all Emissions Reduction Fund applicants on state land should contact the Department of Natural Resources, Mines and Energy prior to registering an Emissions Reduction Fund project. This is to ensure that potential issues and options for resolution are identified early. All applications will be assessed on a case-by-case basis.

For state land enquiries, the Department of Natural Resources, Mines and Energy may be contacted by phone on (07) 4447 9164 or email SLAMlodgement@dnrme.qld.gov.au.

An applicant can apply for the grant of a right to deal with carbon abatement product under the Forestry Act (Qld). The process for lodging an application can be found in the fact sheet "Department of Agriculture and Fisheries Involvement in Emissions Reduction Fund Projects"⁵⁰.

For Forestry Act enquiries, the Department of Agriculture and Fisheries may be contacted by phone on 13 25 23 or email forestproducts@daf.qld.gov.au.

Queensland land rights legislation

The Aboriginal Land Act (Qld) and *Torres Strait Islander Land Act 1991*⁵¹ (Qld) were introduced to transfer land (including the existing community lands and some lands reserved for particular purposes) to Aboriginal or Torres Strait Islander people. This is to enable the management of land according to their traditions or customs on behalf of, and for the benefit of, the broader Aboriginal or Torres Strait Islander group.

⁴⁹ <http://www.qld.gov.au/environment/land/state/use/carbon-rights>.

⁵⁰ <https://www.daf.qld.gov.au/forestry/state-native-forestry/emissions-reduction-fund-projects>

⁵¹ <https://www.legislation.qld.gov.au/view/asmade/act-1991-033>

Victoria

Land in Victoria can be divided into two categories: Crown land and alienated land. Land can be alienated from the Crown by a grant of freehold or by a lease.

The *Climate Change Act 2017*⁵² (Climate Change Act) (Vic) provides mechanisms for proponents to register carbon rights on both freehold and Crown land. While registering a carbon right is not required under the CFI Act, it provides legal certainty regarding carbon ownership, even if ownership of the land should change. Registering a carbon right is the primary mechanism for obtaining the legal right to conduct projects on leased Crown land in Victoria.

Note that registration of a carbon right does not waive any other permissions required to legally conduct the project activities, such as ensuring activities are permitted under the project's land tenure or consideration of native title requirements.

For enquiries about conducting Emissions Reduction Fund projects in Victoria, please contact the Department of Environment, Land, Water and Planning on 136 186.

Freehold land

A landowner is permitted to apply the following Emissions Reduction Fund methods and their associated project activities:

- Sequestering carbon in soils in grazing systems method
 - » Changing the land use from continuous cropping to permanent pasture
 - » Undertaking pasture cropping
 - » Removing of livestock
- Native forest from managed regrowth, and human-induced regeneration methods
 - » Managing the timing, and the extent, of livestock grazing
 - » Managing, in a humane manner, feral animals
 - » Managing of plants that are not native to area
 - » Cessation of mechanical or chemical destruction, or suppression, of regrowth
- Estimating sequestration of carbon in soil using default values method
 - » Nutrient management
 - » Soil acidity management
 - » New irrigation
 - » Pasture renovation
 - » Conversion of land use to pasture
 - » Stubble retention
- Measurement-based methods for new farm forestry plantations
 - » Establishment of a permanent planting
 - » Establishment of a new farm forestry plantation
- Reforestation and afforestation and reforestation by environmental or mallee plantings methods
 - » Planting of permanent mixed-species trees
 - » Permanent mallee plantings
- Plantation forestry method
 - » Establishing a new plantation forest
 - » Converting a short-rotation plantation to a long-rotation plantation

However, there may be local government requirements for some of the above-listed activities, such as planting trees. Project proponents should contact their local government authority to confirm any such requirements before commencing the project.

Part 7 of the Climate Change Act (Vic) provides a mechanism for the recognition of forestry rights, carbon sequestration rights and soil carbon rights on freehold land in Victoria. The registered owner of the land may enter into a forestry and carbon management agreement with the owner of the forestry carbon right relating to the land (if any) and with any other person. The forestry and carbon management agreement can impose management obligations in relation to any one of the following:

- Carbon sequestration by vegetation.
- Carbon sequestration underground.
- The management of vegetation.

⁵² <https://www.climatechange.vic.gov.au/legislation/climate-change-act-2017>

The registered proprietor of a relevant interest (land owner, leaseholder or forest carbon right owner) who is party to a forestry and carbon management agreement can register their interest on title with the Victorian Registrar. The obligations specified in the forestry and carbon management agreement run with the land affected and are binding on any future owners or leaseholders of that land for the duration of the agreement. Any party to the forestry and carbon management agreement may apply to the Victorian Civil and Administrative Tribunal to enforce the terms of the agreement.

- Three proprietary 'forest carbon rights' interests may be created under the Climate Change Act (Vic):
 - » a carbon sequestration right—the right to commercially exploit carbon sequestered by vegetation on the land,
 - » a forestry right—the right to plant, establish, manage and maintain vegetation on the land, coupled with rights to access the land, and
 - » a soil carbon right—the right to commercially exploit carbon sequestered underground, excluding carbon sequestered in plants.
- Part 7 of the Climate Change Act (Vic) provides for the creation and transfer of forest carbon rights on private land.
 - » Forestry and carbon management agreement will attach to the forest carbon rights and bind the holder of those rights and anyone who subsequently purchases such rights. These agreements can impose management obligations relating to carbon sequestration by vegetation and underground as well as the management of vegetation. They allow for management arrangements to be specified in detail to balance the competing interests of those interested in timber and those interested in the benefits of carbon sequestration.

Crown land

Part 8 of the Climate Change Act (Vic) enables the Secretary of the Victorian Department of Environment, Land, Water and Planning to assign carbon rights on Crown land to individuals or companies who are willing to operate as a provider of carbon offsets through revegetation or restoration activities undertaken on that Crown land.

The Secretary of the Department of Environment, Land, Water and Planning may enter a carbon sequestration agreement with an external provider to allow them to undertake carbon sequestration activities on Crown land. Through the carbon sequestration agreement, the Secretary may grant carbon sequestration rights or soil carbon rights to that external provider. The provider has an ongoing maintenance obligation for this vegetation for the duration (either 30 or 100 years) of the carbon sequestration agreement

The carbon property rights associated with these revegetation activities are vested with the provider for their exclusive use. The carbon sequestration agreement template was primarily developed to enable project proponents to register their carbon sequestration projects on Crown land with the Clean Energy Regulator to generate Australian carbon credit units under the Emissions Reduction Fund. However, the Department of Environment, Land, Water and Planning is neutral as to how these carbon rights are used, and it is up to the provider to determine their optimum strategy to monetise their accrued carbon property rights.

- What types of carbon rights are possible under a carbon sequestration agreement?
 - » Under a carbon sequestration agreement it is possible to grant exclusive rights to the economic benefits of:
 - › Carbon sequestered by vegetation, or
 - › Soil carbon stored underground, excluding the carbon stored within plants.
- Who can be a party to the carbon sequestration agreement on Crown or public land?
 - » Any third party can hold a carbon sequestration agreement on Crown or public land.
- How will the Department of Environment, Land, Water and Planning balance multiple users and uses of Crown land?
 - » Important checks and balances have been put into the system to ensure that carbon projects do not clash with other existing public land uses, including:
 - › Carbon sequestration agreements can only be made on classes of public land declared available by the Governor in Council, or in relation to Crown land under relevant Acts, provided entering into the agreement is not inconsistent with the requirements of the relevant law (i.e. *Forests Act 1958*⁵³(Vic), *Crown Land (Reserves) Act 1978*⁵⁴(Vic), *Land Act 1958*⁵⁵(Vic), *National Parks Act 1975*⁵⁶ (Vic), *Sustainable Forests (Timber) Act 2004*⁵⁷(Vic) and *Victorian Plantations Corporation Act 1993*⁵⁸(Vic)).
 - › Carbon sequestration agreements cannot be made on land used for other authorised purposes, and carbon sequestration agreements can only be applied to land covered by Crown leases and licenses, if individual lease conditions allow, and with the consent of any lessee or licensee.

⁵³ http://www8.austlii.edu.au/cgibin/viewdb/au/legis/vic/consol_act/fa1958116/

⁵⁴ http://www8.austlii.edu.au/cgibin/viewdb/au/legis/vic/consol_act/cla1978219/

⁵⁵ http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/la195848/

⁵⁶ http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/e84a08860d8fa942ca25761700261a63/59895c9447166527ca25829d00188fdb?OpenDocument&Highlight=0,Act

⁵⁷ http://www8.austlii.edu.au/cgibin/viewdb/au/legis/vic/consol_act/sfa2004289/

⁵⁸ http://www8.austlii.edu.au/cgibin/viewdb/au/legis/vic/consol_act/vpca1993386/

- How will the Department of Environment, Land, Water and Planning balance multiple users and uses of Crown land?
 - » Important checks and balances have been put into the system to ensure that carbon projects do not clash with other existing public land uses, including:
 - › Carbon sequestration agreements can only be made on classes of public land declared available by the Governor in Council, or in relation to Crown land under relevant Acts, provided entering into the agreement is not inconsistent with the requirements of the relevant law (i.e. *Forests Act 1958*⁵⁹(Vic), *Crown Land (Reserves) Act 1978*¹(Vic), *Land Act 1958*¹(Vic), *National Parks Act 1975*¹ (Vic), *Sustainable Forests (Timber) Act 2004*¹(Vic) and *Victorian Plantations Corporation Act 1993*¹(Vic)).
 - › Carbon sequestration agreements cannot be made on land used for other authorised purposes, and carbon sequestration agreements can only be applied to land covered by Crown leases and licenses, if individual lease conditions allow, and with the consent of any lessee or licensee.
 - › The Department of Environment, Land, Water and Planning Secretary is responsible for making decisions about carbon sequestration agreements and must consider social, economic and environmental implications. The Department of Environment, Land, Water and Planning Secretary retains the right to end carbon sequestration agreements.
 - › Carbon sequestration agreement decisions must also be publicly advertised and put on a publicly available register.

Traditional Owner Settlement Act 2010 (Vic)

In Victoria, project proponents need to be aware of the *Traditional Owner Settlement Act 2010*⁵⁹ (Traditional Owner Settlement Act) (Vic). This Act provides an out-of-court settlement process to recognise traditional owners and certain rights on Crown land.

As these rights are recognised on Crown Land, the right to undertake an Emissions Reduction Fund project activity, and the exclusive carbon sequestration rights on the relevant land should be defined in an agreement between the State of Victoria and a Traditional Owner group. If a Traditional Owner group enters into a Land Use Activity Agreement as part of the settlement, then a carbon sequestration project proponent would be required to enter into a separate agreement with the relevant Traditional Owner Board prior to being given access to Crown land by the state.

Further information is available on the Victorian State Government website⁶⁰.

The Native Title Act in Victoria

The grant of a carbon right on native title land may constitute a future act. Legal advice should be obtained for each specific case.

Victoria land rights legislation

There was no Indigenous land claims procedure in Victoria before the Native Title Act was passed in 1993. The Traditional Owner Settlement Act (Vic) provides for the making of recognition and settlement agreements between the State of Victoria and traditional owner groups for areas of public land. Among other things, the *Aboriginal Lands Act 1970*⁶¹ (Vic) provides for the lands reserved for the use of Aboriginal people at Framlingham and Lake Tyers to be vested in a Framlingham Aboriginal Trust and a Lake Tyers Aboriginal Trust respectively.

⁵⁹ http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/tosa2010326/

⁶⁰ www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act

⁶¹ http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/ala1970144/