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UK pension transfers: part 1
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Carbon farming: tax issues for primary producers

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Owners of primary production land are increasingly being approached by carbon credit service companies to participate in carbon abatement projects. For many primary producers, this development represents an opportunity to generate additional cash flow by venturing surplus or marginal parts of their land into projects and/or changing to "greener" agricultural practices in order to qualify for eligible offsets projects. This article highlights some of the significant tax issues for primary producers participating in eligible offsets projects. The article not only addresses the carbon credit tax regime itself, but also some of the ancillary commercial, structuring and planning issues that primary producers are likely to encounter when participating in eligible offsets projects. It can be seen that there are a multitude of issues to be considered by primary producers, and therefore their advisers, when contemplating participating in carbon farming projects.

Background

Owners of primary production land are increasingly being approached by carbon credit service companies to participate in carbon abatement projects. Credits generated from such projects have a ready market in that the Commonwealth will purchase the credits under the existing regulatory regime.

For many primary producers, this development represents an opportunity to generate additional cash flow by venturing surplus or marginal parts of their land into projects and/or changing to "greener" agricultural practices in order to qualify for eligible offsets projects. In addition, on the expectation that the price for carbon credits will increase on a reliable basis over time, increases in the capital value of any primary production land generating such credits might also be anticipated.

This article highlights some of the significant tax issues for primary producers participating in eligible offsets projects in accordance with the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act). The article not only addresses the carbon credit tax regime itself, but also some of the ancillary commercial, structuring and planning issues that primary producers are likely to encounter when participating in eligible offsets projects.

The authors expect these issues to become of increasing significance to primary producers as the market for carbon credits develops and matures over time.

The carbon farming regime

Legal framework

Before reviewing the tax issues, it is first necessary to understand the broad principles of the financial model and regulatory framework. The legislation itself has been around for more than a decade but only in recent years has there been a widespread proliferation of activity in the Australian agribusiness sector.

The regime is primarily governed under the extensive provisions of the CFI Act and the accompanying rules in the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (Cth) (CFI Rules). Its broad hallmarks may be summarised as follows:

- applicants must submit projects to the Clean Energy Regulator (the Regulator) for assessment. The project proposal must provide detailed information to meet the specific requirements of the CFI Act and provide methodology as to precisely how the project will reduce greenhouse gas emissions;
- the entity responsible for, and with the legal right to carry out, an offsets project is known as the project proponent.[1] It is the project proponent's responsibility to submit the application;[2]
- the CFI Act allows the landowner to be a project proponent, but this can also be a third party. It is also possible to have multiple project proponents;[3]
- the project must take the form of an eligible project.[4] However, broadly speaking, all projects have an overarching objective of reducing greenhouse gas emissions by mechanisms of either avoidance or removal of carbon emissions;
- the CFI Act delineates between different types of projects that broadly fall within one of two categories. These are emissions avoidance offsets projects and sequestration offsets projects (the latter commonly referred to as carbon sequestration projects);[5]
- common examples of emissions avoidance projects include the reduction of greenhouse gases by way of livestock management (eg the reduction of cattle emissions by feeding nitrates to beef cattle or the introduction of dietary additives to dairy cows) and

savanna and grassland fire management (eg strategic planned burnings);[6]

- by way of comparison, carbon sequestration projects typically involve reforestation, revegetation, restoring rangelands and protecting or maintaining native forest or vegetation.[7] In essence, these are projects which trap or remove carbon from the atmosphere and store it in plants or in soil;
- if the Regulator approves the offsets project, a declaration is made by the Regulator resulting in the project being deemed as an eligible offsets project.[8] This ultimately results in the project and project proponent qualifying for the generation of carbon credits that may be sold by the registry account holder (see below) to the Commonwealth or third parties;
- the entity that qualifies for credits (ie the project proponent), or wishes to hold credits, must establish an account via the Australian National Registry of Emissions Units (known as a registry account).[9] A registry account allows for the ownership of credits to be tracked and recorded in the public register;
- the main form of credit relevant to Australian farmers is the ACCU or Australian Carbon Credit Unit. In broad terms, one ACCU is able to be earned for each tonne of CO_2 equivalent net abatement that is avoided or stored by an eligible offsets project;[10]
- each project has a set period of time under which it is able to generate ACCUs over its lifespan. This period is referred to as the crediting period of the project.[11] Typically, the crediting period begins from the date the project is registered, but it may also be another nominated start date, being no later than 18 months after a project is declared eligible;[12]
- the crediting period for a carbon sequestration project is typically 25 years, but can be 15 years for certain projects.[13] The crediting period for an emissions avoidance project is seven years but can be 25 years for certain projects;[14]
- ACCUs are generated each time the project proponent applies for and is issued with a non-transferrable certificate of entitlement by the Regulator.[15] A certificate of entitlement is granted to the project proponent by submitting an offsets report to the Regulator in relation to the carbon sequestration or emissions avoidance achieved by the project.[16] The offsets report is submitted at the end of each reporting period, of which there will be multiple over the entirety of the project's crediting period.[17] The ACCUs are thereafter credited to the nominated registry account for the project;
- the applicable reporting period will depend on the type of eligible project and the activities conducted. For sequestration projects, a reporting period can be between six months and five years,[18] and for an emissions avoidance project between six months and two years.[19] Each subsequent reporting period commences immediately after the end of the prior reporting period;
- for carbon sequestration projects, it is worth noting that such projects must be carried on for a set period of time (known as the permanence period), being either 25 or 100 years.[20] The period chosen will impact on the amount of ACCUs generated under the project. For example, a 25-year project will result in a negative discount factor of 20% being applied against any ACCUs generated, whereas a 100-year project will have no discount factor.[21] By comparison, emissions avoidance projects do not have a permanence period;
- ACCUs qualify as personal property[22] and, subject to the CFI Act, can be assigned. This facilitates the ability to buy, sell and deal in ACCUs on the open market or sell ACCUs back to the Commonwealth under a carbon abatement contract;[23] and
- a security interest may also be granted over an ACCU and it can be held on behalf of others under a trust or similar type of arrangement regarding beneficial ownership.[24]

It can be seen from the above summary that the CFI Act provides a framework for primary production landowners to derive extra income from their land by participating in an eligible offsets project and from the generation and sale of ACCUs.

Carbon farming contracts

Due to the technical expertise required in submitting and managing an offsets project, the projects are often undertaken by specialist companies, generally referred to as carbon service providers (service providers).

A service provider may also be an aggregator, being an entity that brings multiple sources of carbon abatement together either by way of aggregating projects (ie into a single registered project) or aggregating contracts.

Service providers will often approach landowners with a view to entering into a written contract, here referred to as a carbon farming contract.

The carbon farming contract will set out the basis for the landowner and the service provider to work together in initiating, developing and eventually submitting an offsets project for it to become registered as an eligible offsets project and generate ACCUs.

Typically, a carbon farming contract will include details such as:

- delineating the precise area of the land to be the subject of the offsets project;
- identifying and appointing the project proponent(s);
- placing obligations on the landowner to do all things reasonably necessary and execute all such agreements as are required so that the project can be carried out and maintained as an eligible offsets project;
- allowing the service provider access to the project area of the land for the purposes of all feasibility studies and later carrying out the project, including internal audits by the staff or agents of the service provider;

- agreeing on who is to open the registry account and who is to be the holder of ACCUs generated from the project;
- placing obligations on the service provider to develop budgets, projections and all financial reporting data associated with the project;
- granting ownership of any carbon rights by the landowner to the service provider either exclusively or on some shared basis;
- external audit obligations; and
- agreeing on the basis of the sharing of ACCUs generated or proceeds from their sale.

It should be appreciated that there is a high degree of flexibility in how these issues may be negotiated and agreed. A key issue for advisers will be to ensure that they are on the "front foot" when their clients are approached to enter into such contracts so that the issues and terms of the contract are carefully considered before execution.

Commercial and legal issues for landowners

Aside from the tax law issues (explored below), there are a number of commercial and risk management issues that landowners will need to consider when entering into a carbon farming contract.

These issues might include all or any of the following:

- Does the landowner have sufficient land (normally areas that are not otherwise used productively in its main primary production activities) that could be used in an offsets project so as to ensure that the project is viable?
- What precise obligations will be placed on the landowner and, if agreeable, are there any practical impediments to carrying them out?
- What are the likely costs to the landowner or its associated entities in carrying out the project and to what extent can they be tax-effective (see further below)?
- What is the term of the project and what termination rights exist during the term?
- What are the payment terms for the landowner (ie form, frequency and quantum of expected payments)?
- Has disclosure been made to the landowner's financier? Agreeing to an offsets project will normally require mortgagee consent and so, assuming the land is subject to bank security, approval will need to be sought;
- ACCUs are a financial product and therefore any dealing in them may require certain parties to hold an Australian financial services licence (AFSL) or will otherwise require compliance with the financial licensing provisions of the *Corporations Act 2001* (Cth). Are these requirements met?
- Will an existing offsets project increase the value of the land on its sale? Alternatively, could the ongoing obligations to the service provider and the Commonwealth act to potentially decrease the sale price?
- What precise structuring issues does the primary producer need to address?

As to the last issue, it is worth emphasising that, as carbon farming agreements are normally a contract between the service provider and the landowning entity, it is necessary to consider the structuring implications. It is commonplace with many agribusiness structures for the landowning entity to be separate from the operating entity.[25] Particular strategies need to be developed to ensure that the right entity bears the expenditure and derives the income from the project.

It should be appreciated that the above issues are merely a summary of the typical issues that arise in practice. Specialist advice relevant to the particular circumstances should be sought on any given project.

Taxation issues

Tax regime for ACCUs

Division 420 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) contains a specific taxation regime that applies to the acquisition, holding and disposal of registered emissions units, including ACCUs. "Registered emissions units" are defined as ACCUs and Kyoto units for which there is an entry in a registry account.[26] For convenience, only ACCUs are referred to here.

Before addressing the operation of Div 420, it is important to bear in mind that not all landowners participating in an offsets project will be subject to the taxation regime under Div 420. In particular, Div 420 only applies to taxpayers that "hold" registered emissions units. A taxpayer will only "hold" an ACCU if it is the entity in whose registry account there is an entry for the ACCU (subject to the nomination provisions discussed below).[27]

Many carbon farming agreements will restrict this role to the service provider, who will hold the registry account and will acquire, hold and sell ACCUs in its own right – while agreeing to share the proceeds with the landowner. Such income would, in the authors' view, simply be treated as ordinary income rather than income generated from the disposal of ACCUs that is taxed under Div 420.

The overarching policy intent of Div 420 is to produce the same income tax treatment for ACCUs irrespective of the purpose of acquiring or holding the ACCUs.[28] In other words, the notion of holding ACCUs as trading stock or otherwise on revenue or capital account is not directly relevant to the taxation treatment of dealing in ACCUs held by a taxpayer.

The principal features of Div 420 may be summarised as follows:

- a taxpayer can deduct expenditure that it incurs in becoming the holder of an ACCU (but see below as to a significant limitation on this specific deduction insofar as issues of ACCUs are concerned), as well as for expenditure incurred in ceasing to hold an ACCU;[29]
- a taxpayer's assessable income in the income year in which it ceases to hold an ACCU includes any amount the taxpayer is entitled to receive because it ceases to hold the ACCU;[30]

- at year-end, the taxpayer must compare the value of all ACCUs held at the start of the income year against the value of all ACCUs held at the end of the income year. To the extent that there is a difference in such values, any excess at the end of the year over the start of the year will be assessable to the taxpayer, while any deficiency will be deductible.[31] This effectively reverses the deduction for ACCUs until the year of sale;
- subject to the comments further below, the taxpayer can undertake the abovementioned valuation at the end of an income year by applying one of three available methods, namely, the first in, first out (FIFO) cost method, the actual cost method or the market value method;[32]
- the value attributed to an ACCU held at the start of an income year must be the same amount adopted at the end of the previous income year (or nil if the ACCU was not taken into account under Div 420 at the end of the previous income year);[33] and
- Div 420 provides an exclusive code in that a taxpayer is precluded from deducting costs associated in becoming the holder of an ACCU (except for issue costs – see below) under any provision outside of Div 420 and is also not assessed on income derived from ceasing to hold an ACCU under any provision outside of Div 420.[34] Further, registered emissions units are specifically carved out from the definition of "trading stock" and hence a Div 70 ITAA97 analysis will not apply in relation to ACCUs.[35]

> "... the tax treatment of dealing in ACCUs is analogous to the tax treatment of trading stock, with some important differences."

It may be seen from the above outline that the overall taxation treatment of dealing in ACCUs is somewhat analogous to the taxation treatment of trading stock. There are, however, some important differences. For instance:

- the methods for choosing how to value ACCUs (ie FIFO cost, actual cost or market value) and the ability to choose those methods differ considerably from a trading stock analysis under Div 70. By way of example, taxpayers that commence to hold ACCUs for the first time in an income year may choose any of the above methods to value the ACCUs at the end of the income year. However, if no choice is made, the FIFO cost method applies by default;[36]
- the taxpayer may subsequently choose one of the above methods in later income years subject to the proviso that, if no choice is made, the value of the ACCU held at the end of the current income year is worked out using the same method that applied to the most recent income year at the end of which the taxpayer owned ACCUs;[37]
- this choice of method is also subject to the proviso that the taxpayer is precluded from making a choice for a current income year unless the same method applied for each of the four most recent income years at the end of which the taxpayer held ACCUs and this method as previously applied is different from the method to which the taxpayer's choice for the current income year relates.[38] Taxpayers are also precluded from choosing to apply the actual cost method for an income year if the FIFO cost method applied in the most recent income year at the end of which the taxpayer held ACCUs.[39] Similar restrictions on the choice of method do not arise under Div 70;
- normally, the costs associated with acquiring trading stock are deductible, whether on revenue or capital account.[40] While Div 420 provides a specific (and exclusive) deduction for costs incurred by taxpayers in becoming a holder of an ACCU (ie regardless of whether the expenditure is properly seen as being on revenue or capital account), the specific deduction for *issue* costs is expressly limited to expenditure incurred in preparing or lodging an application for a certificate of entitlement or an offsets report.[41] This is a significant issue for primary producers as it means that all such other costs associated with being issued with an ACCU (as opposed to acquiring an existing ACCU) must fall within the general deduction provision in s 8-1 ITAA97 if a deduction is to be claimed. It might be expected that much of the taxpayer's issue costs in this regard would be capital in nature and therefore requires consideration of potential deductions available under the capital allowance regime (including primary production write-offs referred to below or the blackhole expenditure provisions);[42]
- the choice of valuation methods must be made before the taxpayer lodges its income tax return for the income year for which the choice is made.[43] The choice is irrevocable.[44] It is therefore critical that careful consideration is given to the choice of method before lodging the taxpayer's income tax return as it will not be permissible to choose to adopt a different method for the year at a later time;
- there are a range of provisions in Div 420 addressing circumstances in which registered emissions units are transferred between foreign accounts and Australian registry accounts. A discussion of the operation of these provisions is outside the scope of this article. However, these provisions will need to be considered in the event that the transaction involves foreign registry accounts or non-resident holders of ACCUs; and
- while there are various forms of roll-over relief aimed at preventing assessable income arising on notional disposals when transferring trading stock to associates, no such roll-over relief is available under Div 420.

Finally, it should be emphasised that, consistent with the object of Div 420, there is no requirement that the taxpayer is carrying on a business in order to fall within the taxing regime under Div 420. Trading stock, on the other hand, by definition requires that stock is produced, manufactured or acquired and held for purposes of manufacture, sale or exchange "in the ordinary course of a business".[45]

Primary production income

At present, income from the sale of ACCUs is unlikely to qualify as primary production income on the basis that it would not constitute income derived from, or resulting from, the taxpayer carrying on a primary production business.[46] In particular, the activities associated with an eligible offsets project would not usually fall within the definition of "primary production business" within the specific meaning ascribed to that phrase under s 995-1 ITAA97.

A question arises as to whether the derivation of income by way of a share in the proceeds from a carbon farming project (as distinct from income from the sale of ACCUs held by the taxpayer itself) could constitute primary production income. Such an argument would necessarily proceed on the basis that the carbon farming income is merely an incident of carrying on the primary production business rather than being derived from a separate activity of substance (or a "virtually separate business" to adopt the words of the Commissioner in IT 210).[47]

That said, the Commissioner has traditionally adopted a strict interpretation of when income is derived "from" a given primary production business, as distinct from income derived from a separate project conducted by the same taxpayer on the same land.[48]

The implications of carbon farming income not constituting primary production income include, among other things, that:

- income from ACCUs cannot typically be subject to the primary production averaging provisions.[49] Moreover, if as a result of the eligible offsets project, the taxpayer's primary production income is expected to decrease on a continual or permanent basis, the taxpayer may wish to consider opting out of the averaging system given that it is likely that future assessments will be subject to increasing tax adjustments under the averaging regime; and
- income from ACCUs may potentially limit or deny primary producers access to farm management deposits where the non-primary production income exceeds certain thresholds (usually $100,000 of taxable non-primary production income).[50] The timing of the derivation of assessable non-primary production income and the incurrence of non-primary production deductions may become important in this regard.

For the above reasons alone, thought should be given to acquiring ACCUs in separate entities from the main primary production operating entity.

On 21 March 2022, a joint media release was issued by the then Minister for Agriculture and Northern Australia (the Hon. David Littleproud MP) and the then Assistant Treasurer (the Hon. Michael Sukkar MP). The release announced that the former Coalition Government would implement measures to allow the sale of ACCUs by primary producers to be treated as primary production income. This announcement was then supplemented in the 2022–23 federal Budget papers.[51] At the time of writing, the Albanese Labor Government has made no announcement on whether it proposes to adopt this measure.

Even if adopted, there are some real issues as to how far such legislation will go in addressing these issues. The Budget announcement only deals with treating income from the sale of ACCUs generated from "on-farm" activities as primary production income for the purposes of the farm management deposit and income averaging schemes. For instance, the following questions remain unanswered:

- Would the new measure treat primary producers' share of income derived from the sale of ACCUs by a service provider as primary production income?
- Would the treatment of income derived by primary producers from eligible offsets projects overcome the issues that will potentially arise under the non-commercial loss rules where income from such projects exceeds $250,000 per individual (see further below)?
- Would any capital expenditure on primary production depreciating assets that relate to the eligible offsets project become subject to the accelerated deductions under Subdivs 40-F and 40-G ITAA97 (see further below)?

Based on the announcements to date referring only to the farm management deposit and primary production income averaging schemes, the answer to each of the above questions appears to be "no". Interestingly, the Budget announcement does suggest that the taxing point of ACCUs for "eligible" primary producers would also be amended such that primary producers would not need to undertake the annual tax accounting for ACCUs at year-end.

The breadth of any new legislation – assuming that the Albanese Government sees fit to introduce the measures announced by the Coalition – will certainly require close scrutiny.

Project expenditure and primary production write-offs

Significant capital expenditure may often be required to ensure that a project qualifies as an eligible offsets project and can be registered with the Regulator as such.

Primary producers have long had access to a range of capital write-offs that allow for accelerated deductions associated with effecting improvements to land used in carrying on a primary production business. These are generally found in Subdivs 40-F and 40-G ITAA97 and include:

- water facilities;
- fodder storage assets;
- horticultural plants;
- fencing assets; and
- landcare operations.

All of these deductions require that the capital expenditure incurred in relation to the facility or asset must have been incurred primarily and principally for use in carrying on a

primary production business on land in Australia.[52] In the authors' view, and in light of the matters raised above, this is potentially an issue in making such claims in furtherance of an eligible offsets project. The Commissioner adopts a similar view in (now withdrawn) ATO ID 2004/634 that mallee trees that were planted and cultivated for the purposes of selling the carbon credits generated under a state government scheme in New South Wales did not qualify for a deduction under Subdiv 40-F as horticultural plants. Care is therefore urged in this area.

Capital allowance deductions for depreciating assets based on the effective life of the asset under Div 40 ITAA97 may be the safer course for the time being. Of course, to qualify under Div 40, the asset must meet the definition of a depreciating asset by being an asset that has a limited effective life and can be reasonably expected to decline in value over the time it is used.[53] It should be noted in this regard that "land" cannot be a depreciating asset. However, improvements to land can qualify.[54] This is of course subject to the same expenditure being eligible for capital works deductions for buildings or structures under Div 43 ITAA97 and therefore potential capital works deductions should also be considered.

Structuring issues: entities and project

As noted already, a carbon farming contract will normally be entered into between a service provider's entity or entities and the landowning entity.

Some contracts of sufficient scale may also involve the establishment of a special purpose vehicle for the purposes of acquiring, marketing and selling ACCUs in which the service provider and the landowning entities take up equity.

As already noted, where the primary producer's landowning entity is separate from its operating entity, it may be necessary for the operating entity to also be party to the contract. Alternatively, there should at least be a mechanism in place for the operating entity to act as the landowning entity's agent in carrying out its various obligations under the contract. This is because, in a primary production context, many landowning entities will not necessarily derive any income from the farm operations and will simply make their land available to an operating entity for no rent or licence fee. The landowning entity may not even have a bank account. Moreover, even if rent or some fee is paid to the landowning entity by the operating entity, it may not be the optimal entity in which to accrue income from eligible offsets projects.

A further issue arises where the service provider and landowner have agreed for the landowner to hold a registry account and acquire, hold and sell ACCUs. In these cases, it may be worthwhile for the operating entity to appoint the landowning entity as a nominee under s 420-12 ITAA97 for the purposes of determining the income tax implications of dealing in the ACCUs for Div 420 purposes. In particular, this provision allows the taxation treatment under Div 420 to take place at the operating entity level.

Active asset test

An issue arises as to whether land that contains an eligible offsets project and is also used for primary production activities fails the active asset test. This could be an issue where the land is to be sold, crystallising a capital gain for which small business CGT concessions[55] might otherwise be available. It is also potentially an issue where land might be transferred as part of a restructure under the small business restructure roll-over.[56]

Broadly, s 152-40 ITAA97 provides that an asset will be an active asset of a taxpayer where it is used or held ready for use in the course of carrying on a business that is carried on by the taxpayer, an entity connected with the taxpayer or an affiliate of the taxpayer (positive limb). An asset will not, however, be an active asset where it is mainly used to derive interest, an annuity, rent, royalties or foreign exchange gains (negative limb).[57]

In the authors' view, the mere existence of an eligible offsets project on part of the land that is otherwise used for primary production activities should not necessarily compromise the active asset test.

Arguably, the positive limb should be satisfied on the basis that there is no need for the land to be used wholly or exclusively in the primary production business or even mainly or predominantly in that business. Instead, it need only be used in the course of conducting a business, which is a lesser threshold.[58]

Moreover, the negative limb may raise issues where the ACCU income represents a passive income stream for the primary producer. To this end, a question arises as to whether income generated from ACCUs falls within the general description of the types of passive income under the negative limb in s 152-40(4)(e). If so, will this mean that land that is mainly used to derive income from ACCUs will fail the active asset test?

Arguably, income generated from ACCUs does not meet the description of any of the specific items in s 152-40(4)(e). However, caution is urged in this regard if the income from ACCUs is passive in nature.

Non-commercial losses

Another issue that should not be overlooked is whether losses generated from primary production activities are able to be applied against income generated by the primary producer from eligible offsets projects.

It can be expected that the non-commercial loss measures in Div 35 ITAA97 will have a role to play here. These measures prevent individuals (including individual partners in partnerships) from applying losses from business activities (including primary production) against other income unless various thresholds or tests are satisfied.

Notably, the non-commercial loss rules will not apply to deny the deduction of the primary production losses if the taxpayer's assessable income from other sources (eg income from ACCUs) was less than $40,000 (excluding net capital gains) for an income year.[59] If the other income

meets or exceeds this $40,000 threshold, it would be necessary to satisfy one of the various tests applicable under the non-commercial loss rules in order for the taxpayer to validly deduct the loss.

If, however, the income from ACCUs (or other non-primary production sources) was $250,000 or more, such tests would not be applicable and a deduction for the primary production loss would be denied (and must be quarantined) unless the taxpayer obtains the favourable exercise of the Commissioner's discretion not to apply the non-commercial loss rules.

It should be emphasised that the non-commercial loss measures only apply to individuals. Therefore, if the entity generating the primary production income is a trust or company, it will have its own carry-forward loss rules and will not be subject to the non-commercial loss measures. This may be of particular concern in circumstances where the business continuity test is sought to be relied on for corporate structures and the ACCU generating activities were not previously carried on by the company in the loss years.

Goods and services tax

The supply of an eligible emissions unit (which includes an ACCU) is GST-free.[60]

This GST-free treatment, however, only applies in relation to the supply of an ACCU itself. This is to be distinguished from the supply of land on which there is an eligible offsets project or any supplies that might be made by the primary producer under the carbon farming contract.

Care should be taken in this regard as there may be taxable supplies in the nature of licences or rights granted to the service provider under the carbon farming contract. Appropriate GST clauses should be included in the carbon farming contract to protect the landowner's interests.

When land being sold contains an eligible offsets project, a question arises as to whether this impacts on the GST treatment. Depending on the scale of the eligible offsets project, there may be issues as to whether the GST-free farm land exemption still applies to the land in question.[61]

Alternatively, land sold that is subject to an eligible offsets project may be regarded as the GST-free supply of a going concern[62] given that an eligible offsets project generating ACCUs is likely to be viewed as an enterprise (bearing in mind that the definition of an "enterprise" for GST purposes is wider than the definition of a "business").

Credit where credit's due?

It may be seen that there are a multitude of issues to be considered when primary producers are contemplating participating in carbon farming projects.

For landowners that have land that is appropriate for eligible offsets projects, the good news is that the potential exists to generate supplementary income. Extra liquidity in the group generated from such income may also assist primary producers with greater flexibility in determining and implementing their precise succession plans.

In the authors' view, these opportunities will only be enhanced if the Albanese Government sees fit to progress the proposal announced by the former Coalition Government to treat income generated by primary producers from eligible offsets projects as primary production income. The breadth of any such relief will be of critical significance to primary producers and their tax advisers.

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References

1 See definition of "project proponent" in s 5 CFI Act.
2 S 27(4)(e) CFI Act.
3 S 135 CFI Act.
4 Ss 22 and 27 CFI Act.
5 See definition of "offsets project" in s 5 CFI Act. See also ss 22, 53, 53A and 54 CFI Act.
6 See definition of "agricultural emissions avoidance project" in s 5 CFI Act.
7 S 54 CFI Act.
8 S 27 CFI Act.
9 For the purposes of the *Australian National Registry of Emissions Units Act 2011* (Cth).
10 Ss 16(2) and 18(2) CFI Act.
11 Pt 5 CFI Act.
12 S 69(4) and (5) CFI Act.
13 S 69(2) CFI Act.
14 S 69(3) CFI Act.
15 Ss 11 and 20 CFI Act.
16 Ss 12, 13 and 15 CFI Act.
17 S 12 CFI Act.
18 S 76(1)(c) and (d) CFI Act.
19 S 76(1)(c) and (e) CFI Act.
20 Ss 23(1)(g) and 27(3)(e) and (f) CFI Act.
21 S 16(2) CFI Act.
22 S 150 CFI Act.
23 Ss 150 to 153 CFI Act; Pt 2A CFI Rules.
24 Ss 157A and 158 CFI Act.
25 See P Slegers, J Pascale and D Marateo, *Australian agribusiness advisers' guide*, Cowell Clarke, February 2022, ch 2.
26 S 420-10 ITAA97.
27 S 420-12(1) ITAA97.
28 S 420-5 ITAA97.
29 Ss 420-15 and 420-42 ITAA97.
30 S 420-25 ITAA97.
31 S 420-45 ITAA97.

32 S 420-51 ITAA97.

33 S 420-50 ITAA97.

34 Ss 420-65 and 420-70 ITAA97. This includes any capital gains (or capital losses) that a taxpayer makes from an ACCU, which are disregarded under s 118-15 ITAA97.

35 S 70-12 ITAA97.

36 S 420-55 ITAA97.

37 S 420-57(1) to (3) ITAA97.

38 S 420-57(5) ITAA97.

39 S 420-57(6) ITAA97.

40 Under s 8-1 ITAA97, noting that s 70-25 ITAA97 provides that an outgoing incurred in connection with acquiring an item of trading stock is expressly precluded from being an outgoing of capital or of a capital nature under s 70-25 (and hence will not fall within the negative limb under s 8-1(2)(a)).

41 S 420-15(4) ITAA97.

42 Div 40 ITAA97.

43 Ss 420-55(4) and 420-57(7) ITAA97.

44 Ss 420-55(5) and 420-57(8) ITAA97.

45 S 70-10 ITAA97.

46 The Commissioner of Taxation has adopted this view in a number of private binding rulings. See, for instance, PBR 1051237204348, PBR 1013032138063 and PBR 1012927800595.

47 See also the Commissioner's views as expressed in IT 225.

48 See, in particular, PBR 1051237204348 and TD 2013/2.

49 Under Div 392 ITAA97.

50 Under Div 393 ITAA97.

51 Australian Government, Budget 2022–23, "Primary producers – increasing concessional tax treatment for carbon abatement and biodiversity stewardship income", *Budget paper no. 2*, p 26.

52 S 40-525 ITAA97.

53 S 40-30(1) ITAA97.

54 S 40-30(1)(a) and (3) ITAA97.

55 Div 152 ITAA97.

56 Subdiv 328-G ITAA97.

57 S 152-40(4)(e) ITAA97

58 *Eichmann v FCT* [2020] FCAFC 155.

59 S 35-10(4) ITAA97.

60 S 38-590 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

61 Under Subdiv 38-O of the *A New Tax System (Goods and Services Tax) Act 1999*.

62 Under Subdiv 38-J of the *A New Tax System (Goods and Services Tax) Act 1999*.

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