



**SUBMISSION BY MCKEAN & PARK LAWYERS TO THE GARNAUT CLIMATE CHANGE
REVIEW PROPOSING AN OFFSET MANAGEMENT SYSTEM IN RESPONSE TO
ISSUES PAPER 1
CLIMATE CHANGE: LAND USE – AGRICULTURE AND FORESTRY**

This submission deals with three issues relating to the oversight management of Offsets and potential solutions. The issues addressed are:

1. **Cost**
 - 1.1 Establishment
 - 1.2 Transaction
 - 1.3 Monitoring
2. **Longevity**
3. **Fraud**

Background

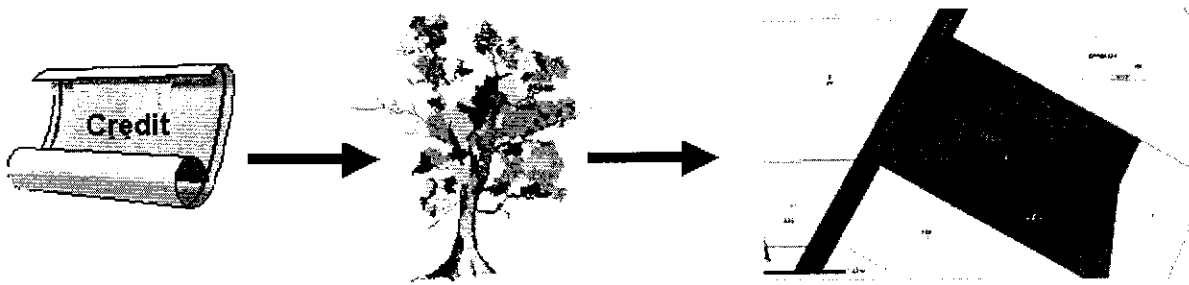
Conceptually any management system for offsets should be standardised, national, inexpensive to set up and run, provide a low cost for transactions, deliver easily accessible information, maintain records for many decades, and supply a framework resistant to fraud.

Such a system is likely to be electronic which provides low cost, accessibility, and national standardisation. Making it fraud resistant, secure, and long lived however may, as has been mooted, prove to be difficult and expensive.

Any offset has to be registered and that registration has to include details of the location, both by description and geophysical coordinates so there is absolutely no doubt about which offsets are being dealt with. Also it needs to record current and past ownership and potentially parties with related interests so rights and obligations can be established. Conceptually setting up and managing such a system has seemed daunting

The Proposal

Our proposed solution, spelled out, is simply this. To commence with, we follow the physical links from carbon offset to the underlying trees or crops then to the land. The carbon credit or offset is linked to the tree or crop which in turn is linked to the land.



While the credit potential and the existence of the trees or crops may be transitory, the land is everlasting. We believe that linking the offset to the crop and to the land provides many benefits.

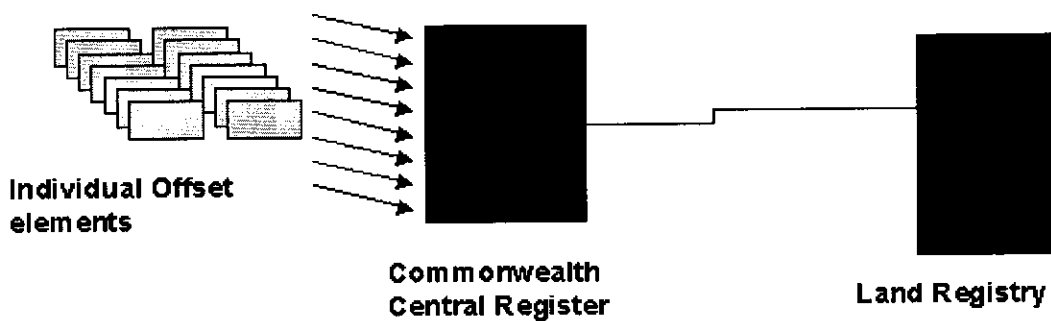
There is in Australia an outstandingly good system for recording the current and past ownership of any piece of land. It records not only the details for that land, but increasingly the geophysical coordinates and has links to satellite imagery. Also it records intangible restrictions which affect the land such as future planned roads, or drainage corridors. This system provides for easy inexpensive transactions, easy internet access to information, is totally secure, and is an extension of the long lived Torrens system of recording land ownership. In recent years this registration system has been extended to include the legal rights of tree ownership and the legal rights to commercially exploit sequestered carbon. What we propose is an extension of this system.

As the system is electronic and is already linked to other systems we propose the following.

The Commonwealth establish a central registry of offset claims which are linked and recorded by notation as a restriction or right connected with an existing land title registration. That existing land registration entry provides (and maintains) all the additional information as to location, ownership, and limitations. It can also contain critical data in respect of the offset that will facilitate subsequent verifications. Linking to it takes advantage of the functionality, essential longevity and security implicit in the system.

This has the potential to substantially reduce establishment cost and time and provide a low cost easily accessible system. Further, by using this proven and secure system which can currently provide tracing and documentation of ownership (current and past) of the trees and the land, there is a substantive basis for ensuring the validity of offsets. Additionally this land data is linked to registers of satellite monitoring.

So to summarise



This works for all individual classes of user

- Emitters and Traders - who wish to trade can do so simply by trading the offset elements.
- Validators - can check individual offset elements or entire sinks with minimum effort and cost using satellite monitoring linked to the land records.
- Investors and Financiers - can similarly also check valid ownership.



- Land and/or Tree owners can register and transact either individually or through intermediaries providing pooling and/or other services.

The land registry provides a permanent record and audit trail back to the original and current land owner. Each land parcel also carries a warning to future purchasers or users of the land or of any interest in the land of the obligation to maintain the sink. That warning can be an obligation enforceable against succeeding land owners and others (see below).

Domestic Advantage

Australia is unique in that it has a fully operational electronic land registry system fully integrated with mapping and satellite imagery. No other country has such a modern system. Its existence makes an Australian domestic system for Carbon Offsets easy and relatively inexpensive to implement. When completed all the necessary data is available to integrate with any permutations of the international system as well as providing potential secure direct access for offshore participants.

For this proposal the technical capability of satellite surveillance of sink locations and the inference of carbon uptake is assumed based on prior work commissioned by the Australian Greenhouse Office.

What needs to be done to implement such a system ?

Registry

The registry for offset entitlements or certificates seems little different from the current provision of a registry of shareholders for a company. Currently in Australia there are more than 30 independent service providers of registry services for companies that keep track of the ownership and disposition of share certificates. They are all linked electronically to the trading exchange and are able to provide updated information to a company on ownership and movements.

One solution to quickly creating a registry given this capability would be to ask for expressions of interest from them and others to provide a registry of both the sinks and related offset components.

Another solution would be to engage the State/Territory Land Registry Offices to perform these services and create the link to the central registry at a later point in the chain.

The service would presumably need Commonwealth authorisation but could be operated under an arrangement with the contracted service provider as is practiced in the health services sector.

Links

Linking the central registry requires that a uniform or at least compatible system be implemented in each State Land Registry Office (land registration being a state responsibility). While State legislation may differ the "Torrens" system of recording land ownership is universal across all States and all have proceeded to upgrade to electronic systems. All such systems have provisions for the inclusion of additional references on Land Titles (a Victoria reference is included as a sample). This includes references prohibiting or restricting land use or announcing the interests of a third party who may be using the land (ie by way of a lease) or have a financial interest by way of a mortgage. In these cases the actual mortgage or lease does not appear as part of the registration entry but there is a link to it. Therefore adding provision for the necessary links represents a small step. Nevertheless it will need to be uniform across all States which will require the cooperation of the Land Registrars and State Governments. There is strong interest and positive interest within several States in using this secure system to record other land related elements, particularly those of an environmental nature.

However coordination of the State Land Law issues will be required.



Documentation

As part of that uniformity, which will ensure both a valid and inexpensive system to operate, the documents required to register a carbon sink, claim offsets, and transact need to be uniform. Given the subtle differences of the Land Law between the States this will require some development, negotiation, and certainly legislation at State level to implement. This is by no means an insuperable issue, far less than developing a uniform company registration system and the process will have positive support. However there will be parochial issues to overcome.

Some further legal issues

1. The linking of offsets to land titles has the effect of notifying everyone dealing with the land of the existence of the offsets that relate to it. If the offsets place an obligation on the landowner, that obligation, in law, must then be honored by everyone who subsequently steps into the shoes of that landowner even if decades elapse in the process.
2. The linking process referred to in paragraph 1 also provides the secure backing of the existing property law in favor of offsets. This means that all those who trade in offsets and those who regulate that process may rely in confidence on the long established rules of property law.
3. McKean & Park's thinking envisages offsets being traded without any need for due diligence procedures. We also envisage the trading of large parcels of unrelated offsets. Our contention is that these are both possible if the proposed system is implemented. In the result, the transactional costs will be considerably reduced.
4. The proposal put forward in this paper makes use of the Torrens system of land ownership recording. That system has been adopted (for gradual application) by a substantial number of other countries but nowhere has it been developed to the same extent as in Australia. This is our considerable advantage. Investigations show, however, that a truncated system could be implemented in other countries even if the Torrens system has not been adopted there or is in a very early stage of application.
5. In Victoria the eleventh century legal concept of "profit a prendre" was, on our advice, avoided in establishing forestry rights and subsequently carbon sequestration rights under the *Forestry Rights Act 1996*. There are, in our view, complex legal reasons for this. There is also the issue that the concept is by no means universally recognized and consequently its application in a truncated system which is adopted in another country could pose problems. This is primarily because the law of profit a prendre (which is a common law concept in Australia and not legislated as such) would need to be enacted as separate legislation in the country adopting the truncated version. In addition the concept has been rejected in some countries, such as the United States, which otherwise adopted the English common law.
6. The system proposed by this paper will identify separately offsets that form one part of a much larger area of identical offsets (eg an area of trees within a plantation of identical trees). This will avoid confusion as to responsibility for specific offsets and issues as to ownership of them.

Our background

At McKean & Park, while not by any means being in the top 20 firms in size, we have specialised in the area of Forestry and related rights and their links to land. We have also been involved for the last 9 years in developing alternatives for an Emission Trading System. We have negotiated with Land Registrars and State Governments in Victoria NSW and SA and Ross Blair our Senior Counsel was the initiator of the original Victorian Forestry Rights Act its amendment in 2001 to accommodate carbon sequestration rights and subsequently advised on the 2005 amendments to prepare a framework for legally secure Emission Offset Trading.

This paper provides only an overview of the proposed process. The detail of the IT systems involved and the legal documentation necessary to implement it fall outside the scope. However from the legal side McKean & Park have



drafted and discussed at State level much of the documentation and legislative changes necessary to implement such a system. McKean & Park therefore would be ready to provide further detail and support should this be required.

McKean & Park

A handwritten signature in black ink, which appears to be 'Ross Blair'. The signature is written in a cursive style and is enclosed within a hand-drawn black oval.

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