



SD07 A CLIMATE FOR CHANGE
Sustainable Development Conference



John Briggs and Gavin Scott

Combating Climate Change through carbon
offsets – the legal perspective

BLAKE DAWSON WALDRON

www.minerals.org.au/sd07



OVERVIEW

- > An introduction to "carbon offsets" and "carbon neutrality"
- > Voluntary offset credits
 - Features of the current market
 - Risks and benefits
 - Due diligence issues
- > Regulated offset credits
 - Credits under the international legal regime
 - Credits under existing Australian schemes
 - Credits under the proposed Australian Emissions Trading Scheme (AETS)
- > Relevance of carbon offsets for major project approvals
 - Potential for increased use of conditions requiring offsets
 - Impact of AETS on this trend



1. AN INTRODUCTION TO CARBON NEUTRALITY AND CARBON OFFSETS

- > Carbon offset: a project that indirectly reduces carbon emissions from one source by providing investment in emissions reductions elsewhere
- > Organisations are increasingly purchasing credits from external offset scheme providers as part of their carbon abatement strategies
- > The aim is to reduce an organisation's net emissions by factoring in credits from offset investments
- > The "carbon neutral" phenomenon
 - Carbon neutral organisations (eg NAB, News Corp)
 - Carbon neutral products and services (eg BP's Global Choice scheme; carbon neutral flights from Qantas and Virgin Blue)



1. AN INTRODUCTION TO CARBON NEUTRALITY AND CARBON OFFSETS

- > Including offsets as part of your carbon strategy?
- > Key issues to consider:
 - Measuring your carbon footprint
 - Critical to establish a credible baseline
 - Which emissions? Scope 1, 2 and 3 emissions?
 - Use of standards such as the GHG Protocol
 - Independent verification to ensure accuracy and credibility
 - What actions should the company take to reduce its carbon footprint?
 - Internal reductions vs "outsourcing" (purchasing carbon offset credits from external providers)
 - Credibility of mix in eyes of stakeholders
 - What type of offset products should the company purchase?
 - Credibility issues
 - Due diligence considerations
 - Focus of presentation



2. VOLUNTARY OFFSET CREDITS

- > Known as "Voluntary Emission Reduction credits" (VERs)
- > Current state of the market for VERs
 - Exponential growth internationally and in Australia
 - Increasing number of organisations voluntarily seeking to reduce their emissions profile by purchasing VERs
 - Demand driven by "carbon neutral" trend
 - Over 17 carbon offset providers in Australia
 - Main source of offsets are forestry projects, but may not be the most "credible"
 - Other sources include energy efficiency measures, renewable energy projects, avoided deforestation, methane flaring, organic waste diversion, fuel switching and recycling
 - Lack of transparency and wide variability of quality of VER
 - Need to carefully weigh benefits and risks and undertake due diligence



2. VOLUNTARY OFFSET CREDITS

> Why invest in VERs?

> Benefits:

- Gain a marketing advantage for particular "green" products
- Improve company reputation and brand value, and hence overall value
- Achieve cost savings from energy efficiency initiatives
- Gain organisational experience in carbon accounting
- Manage regulatory risk by moving early to lock in low-cost offset projects
- Greater range of offset projects available compared with credits from regulated schemes
- Generally lower price of VERs compared with credits from regulated schemes - but are you getting what you paid for?



2. VOLUNTARY OFFSET CREDITS

> Risks:

- Growing criticism of VERs over the last 2 years
- No compulsory minimum requirements about additionality, permanence, leakage or double-counting
- Makes it difficult for purchasers to:
 - compare offset products
 - confidently make claims about their carbon neutral status or carbon footprint
- Risks to purchaser's reputation if credits are used to support carbon footprint claims that cannot be substantiated
- Purchaser may also be exposed to potential legal action, including:
 - claims of misleading and deceptive conduct under the *Trade Practices Act*
 - claims for breach of directors' duties or corporate disclosure rules under the *Corporations Act*
 - common law claims in contract or tort for misrepresentation of the company's carbon profile



2. VOLUNTARY OFFSET CREDITS- MANAGING THE RISKS

> The importance of accreditation and verification

- Cth Govt Sept 2007:
 - "purchasers of offsets and carbon neutral products should be wary of products that are not accredited by a reputable source"*
- Range of accreditation schemes available, including:
 - Gold Standard for voluntary offsets (international)
 - The Voluntary Carbon Standard (international)
 - Greenhouse Friendly™ certification scheme (Cth Govt)
- Which scheme?
 - Some purchasers may want accreditation under international standards, especially purchasers from overseas or with an international profile
 - But may be benefits to being accredited under one of the Australian schemes
 - Eg Greenhouse Friendly™ certification methodologies to be used in future AETS



2. VOLUNTARY OFFSET CREDITS- MANAGING THE RISKS

> The importance of doing your due diligence

- What is the nature of the offset product offered?
- Are the credits clearly defined in the contract?
- Are the credits subject to independent certification and validation requirements?
- How does the offset provider calculate emission reductions from projects?
- Are the offsets "additional"?
- Are the offsets "permanent"?
- Are carbon leakages factored in?
- What other environmental impacts may the offset project have? Is it "sustainable"?
- How does the offset provider ensure that the same credits will not be sold again to multiple buyers?
- What percentage of revenue is spent on marketing and administrative costs rather than the project itself?
- Are the credits likely to satisfy future accreditation standards for the voluntary market?



2. VOLUNTARY OFFSET CREDITS- MANAGING THE RISKS

> The future for voluntary offsets?

- Both major parties have promised greater regulation to protect purchasers
- Development of minimum standards

> Further reading:

- Draft *Carbon Management Principles* – EPA Victoria
- Carbon Innovators Network – EPA Victoria
- *Abatement Incentives prior to the Commencement of the Australia Emissions Trading Scheme*, Discussion Paper, September 2007 - Australian Government Department of Prime and Cabinet
- *Carbon Neutral Watch - Corporates, Consultants and Credibility* – The Total Environment Centre
- *A Consumer's Guide to Retail Carbon Offset Providers* - Clean Air Cool Planet
- *The Carbon Neutral Myth, Offset Indulgences for your carbon sins* - Carbon Trade Watch Transnational Institute



3. REGULATED CREDITS

> Regulated offset credits

- Offset credits that are created or recognised under legal instruments as being eligible for use in satisfying legal obligations under a particular regulatory regime

> International regime under Kyoto Protocol

- LULUCF offsets under Articles 3.3 and 3.4 of KP
- Credits for abatement activities in Non-Annex 1 countries (developing countries) under the Clean Development Mechanism (CDM) projects
- Credits for abatement activities in Annex 1 countries (developed countries) under Joint Implementation (JI) projects



3. REGULATED CREDITS

> National/regional schemes

- EU ETS largest market for regulated credits
- Existing schemes in Australia include NSW/ACT GGAS
- Detailed rules about eligibility of activities to generate credits under the legislative schemes
- Detailed verification requirements
- Existing schemes may be phased out with introduction of AETS



3. REGULATED CREDITS

> Credits under the AETS – 'Early Abatement Incentives Discussion Paper'

- Standards (actual, additional, permanent, measurable, verifiable)
- Post 3 June 2007 abatement only ('early action credits' – v – 'offset credits')
- Approvals protocols being developed – based on Greenhouse Friendly™
- Admin arrangements under NGERS
- National register
- International and domestic offset credits to be recognised
- Transitional arrangements GGAS, etc need further consideration
- Voluntary credits can be approved and registered under AETS



4. THE RELEVANCE OF CARBON OFFSETS FOR MAJOR PROJECT APPROVALS

- > Conditions imposed on environmental approvals for new projects are another potential source of govt regulation of offsets
- > Particular importance to new energy and resources projects
- > May start to see consent authorities mandating carbon offset requirements as conditions of project approvals
- > A number of factors suggest this may be a developing trend
- > Environmental offsets generally are being recognised in environmental planning legislation in Australia
 - eg biodiversity offset schemes under State planning laws
 - consent authorities are becoming more familiar with the offset concept
 - may be more willing to impose offset conditions on approvals



4. THE RELEVANCE OF CARBON OFFSETS FOR MAJOR PROJECT APPROVALS

- > Conditions requiring environmental offsets generally are increasingly being imposed on project approvals under the EPBC Act at 2 stages:
 - "Controlled action" decision stage
 - Offset conditions as "particular manner" requirements
 - Question about legal validity
 - Conditions on approvals
 - To date, environmental offset conditions on approvals determined case-by-case basis
 - But Cth Govt has recently proposed development of formal policy
 - Cth's discussion paper indicates offsets are a legitimate option when they:
 - are necessary or convenient to protect or repair impacts to a protected matter
 - relate specifically to the matter being impacted
 - seek to ensure that the health, diversity and productivity of the environment is maintained or enhanced



4. THE RELEVANCE OF CARBON OFFSETS FOR MAJOR PROJECT APPROVALS

> Carbon offset conditions under the EPBC Act

- To date, no carbon offset conditions imposed on EPBC Act approvals
- Courts have established high threshold in determining when and to what extent GHG impacts need to be considered under the Act
- But if Minister was to determine GHG impacts from a project could have a significant impact on a protected matter, carbon offset conditions on the approval might be imposed
- Introduction of greenhouse trigger to EPBC Act
 - would make imposition of carbon offset conditions more likely
 - policy of the ALP

> Carbon offsets sought by NGOs in climate change litigation

- Eg *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33



4. THE RELEVANCE OF CARBON OFFSETS FOR MAJOR PROJECT APPROVALS

> Impact of the AETS on approval outcomes

- So a number of factors are pointing to the increased potential for carbon offsets to be imposed as conditions of project approvals
- But what effect will the introduction of the AETS have on this issue?
- Uncertainty prevails
- But there are some indications that consent authorities may use the introduction of the AETS as a reason to limit their consideration of GHG impacts



4. THE RELEVANCE OF CARBON OFFSETS FOR MAJOR PROJECT APPROVALS

> Longford gas plant decision

- Decision of Victorian Minister for Planning in August
- Environmental Effects Statement was not required for Esso's new gas conditioning plant
- Given magnitude of emissions from the plant, GHG impacts were a key consideration
- Minister took into account the fact that the proposed plant is likely to be subject to future obligations to monitor and report GHG emissions and incentives to abate these emissions within a legislated framework for emissions trading
- Introduction of AETS was not the main reason relied on by the Minister
- But this is perhaps one of the first examples of the AETS being specifically referred to as a consideration for limiting the assessment of GHG impacts at the State level



KEY MESSAGES

- > Carbon offsets are becoming an entrenched feature of carbon abatement strategies worldwide
- > Regulated offset credits will become an increasingly important part of the offset market in Australia with the introduction of the AETS
- > Demand for voluntary credits is likely to continue to expand, but this market may become more regulated given government and public concerns about credibility of offset products
- > Companies making claims about their carbon footprint need to be able to substantiate those claims or face risks to reputation and possible legal action
- > So do your due diligence: know what you are buying and your objective in buying it