

## Silviculture Certificates for Plantations – who owns them?

These days, substantial areas of the Australian countryside are covered with plantations containing hectare after hectare of trees. These plantations, and others to follow them, sop up tonnes and tonnes of CO<sub>2</sub> every day by means of the photosynthesis process which sequesters the gas, converts the carbon into tree fibre and soil and emits the oxygen back into the atmosphere.

It is trees, and plantation trees in particular, that our government is relying on to assist it in the battle against greenhouse gas (GHG) emissions. Indeed the silvicultural sequestration of GHG by plantation trees has already been factored into the national GHG accounting.

In order to properly include silviculture sequestration, however, it is necessary that individual plantations be legally committed to the task of capturing and locking up CO<sub>2</sub> and, most importantly, keeping it in a solid condition for a very long period of time which has yet to be resolved. To do this, silviculture certificates will be issued to the people who own the trees which is what leads us to the big problem – who in fact does own the trees and who should receive the silviculture certificates and the right to subsequently sell them?

Most plantations these days come into existence through the investments of thousands of Australians, who, shortly before 30 June every year, find themselves potentially in the firing line for a large income tax bill and who, consequently, need to reduce this potential liability by rapidly investing money in an expense that can be immediately written off their incomes. An investment in plantations, particularly timber plantations, is just such an investment but it has to be carried out according to some very precise rules laid down by the Australian Tax Office.

For example, it is not enough to invest your money in the shares of a plantation company which is involved in setting up a new tree plantation. That would be regarded by the ATO as simply another capital investment because it involves only the purchase of shares. Nor can potential income tax liability be quickly reduced by individuals setting up their own plantations because the expense has to occur before 30 June which is only a few days away.

What is acceptable to the ATO, however, is that you invest your money with a plantation company which allocates you one or more specified hectares in a proposed plantation and agrees, as your manager, to grow the trees of the plantation and harvest them when it says they are properly matured. Your payment to the plantation company is then regarded as a legitimate payment of production expenses and you are, from that point accepted as a primary producer with your own little “farm” comprising the one or more hectares allocated to you. The plantation company must spend the money appropriately and within a specified time but an efficient plantation company has plenty of experience in this regard and few if any difficulties in complying with the ATO requirements.

Maybe not all of your hectares will be planted up with trees because all plantations need to retain unplanted areas for firebreaks, forest roads, fire dams, buildings and other infrastructure. That doesn't matter in the long run because the manager agrees with all the investors/primary producers involved in the plantation to distribute the net proceeds of the sale of the timber amongst them strictly in accordance with the number of hectares they have invested in whether these are fully planted up or not.

All that is ok for timber production purposes but not for the production and issue of silviculture certificates. For example, a plantation of 200 hectares may involve 200 separate tree (and potentially silviculture certificate) owners some of whose hectares have no trees on them at all. The plantation company may be the manager of the plantation but it is definitely not the owner of the trees, let alone the silviculture certificates. At best, in its capacity as manager, it may manage silviculture certificates that are issued to the investors/primary producers but the certificates themselves cannot be issued under the prevailing circumstances to the plantation company in its own name. If this were attempted, that ownership could be disputed by the hundreds of individual investor/primary producers who are individually, the true owners. In that case it is questionable as to what rights, if any, an innocent purchaser of the silviculture certificates from the plantation manager would have.

There are a range of other problems. The boundaries, for example, between each hectare “allotment” are not going to be clearly defined. For timber growing purposes it doesn't have to be because all the allotments are part of the one plantation. Ownership of the trees in each allotment is secured to the investors/primary producers by means of a lease (or sublease) issued to them. The lease can change hands either voluntarily or involuntarily, possibly as the result of some unrelated litigation, during the growing of the plantation.

There is also the question of the long-time retention of the trees which is involved in the issue and trading of sequestration certificates. This, unfortunately, can also be the cause of dispute amongst those who have invested in the plantation, either with each other or with the plantation manager.

On the face of it therefore, in order to be able to issue and deal in silviculture certificates in respect of the trees of most Australian plantations we are left with the prospect of issuing and verifying thousands of separate one hectare allotments or alternatively of accepting the uncertain claims by plantation management companies that they are really entitled (at least temporarily) to act as the agents for their investors, despite no express authorisation by all those investors to do so, in respect of sequestration certificates.

Fortunately in Australia, although not elsewhere, the central Registry System which operates in all Australian states and territories, has embedded in its structure a potential methodology which can overcome the problem. That methodology necessitates that all emission certificates in respect of a plantation be "tied" to the land and the trees of that plantation as recorded in the appropriate registry system. This has the additional benefit, however, that the alternative would necessitate the checking and re-checking of all documents (including each set of documents entered into between the plantation manager and each investor owning trees in that plantation) every time silviculture certificates issued in respect of the plantation were to be dealt with.

It has long been the belief that the issuing of silviculture certificates would occur almost exclusively in respect of plantations because of their substantial areas and not in respect of small plantings on individual farms because of the cost involved. When one considers that the vast majority of plantations each comprise small individual holdings of one or more hectares of trees (ill defined) anything else than that which is suggested in this paper would be totally impossible.

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