

Refinements to the development and implementation of the Biodiversity Banking Bill after stakeholder consultation

Department of **Environment and Conservation** NSW



This document was developed to explain proposed changes in response to stakeholder feedback on the Bill (between June and September 2006).

The amended Bill subsequently passed through Parliament and was assented on 4 December 2006.

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Introduction

The NSW Government is committed to conserving biodiversity and threatened species. The Government has significantly expanded the network of national parks; catchment management authorities are delivering incentives for natural resource management for private land; and, there has been an end to broadscale clearing unless it maintains or improves environmental outcomes under the *Native Vegetation Act 2003* (NV Act). Additionally, a comprehensive statement of prioritised recovery actions for threatened species has been placed on public exhibition and will be soon adopted.

Appropriate conservation on private land is, of course, an important part of the strategy to protect important ecosystems and recover threatened species. However, despite the many positive efforts to conserve threatened species and biodiversity, clearing and fragmentation in urban and coastal areas continues to be a cause of biodiversity loss. We need a systematic way to prevent unacceptable impacts and, where impacts are unavoidable, to ensure positive actions are taken to counter-balance the losses. Unfortunately, current laws and systems are failing to deal effectively with the cumulative impact of many small- to medium-scale impacts.

How will BioBanking operate?

The Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006 (the Bill) inserts a new Part 7A in the *Threatened Species Conservation Act 1995* (TSC Act). It will enable the establishment of a biodiversity banking and offsets scheme (BioBanking).

This scheme is intended to apply an innovative and practical market-based approach to help reduce cumulative biodiversity losses caused by population growth and development pressures around urban areas, along the coast and at major inland development sites.

Under the new approach, landholders can voluntarily create biodiversity credits by establishing biobank sites on their land. They do so by entering into a 'biobanking agreement' that is attached to the land title. This agreement allows them to create and sell a specified number of credits in exchange for committing to ongoing conservation management of the land. Anyone is able to purchase these credits from the landholder. Buyers could include:

- a. developers seeking to use credits to offset impacts to biodiversity
- b. government bodies using the market to achieve affordable conservation outcomes on private lands, or
- c. philanthropic organisations that can rely on the scheme's robust structure to ensure the benefits of their endowments are maintained in perpetuity.

Developers can voluntarily use the scheme to calculate the required number and class of biodiversity credits and obtain a biobanking statement to confirm that their project will improve or maintain biodiversity. Credit requirements are then incorporated into the development consent and the credits must be acquired and retired before work commences. The required credits can be estimated (and even purchased) during project formulation, avoiding delays and uncertainty. However, an exemption from the current 7-part threatened species assessment process is obtained *only* where the development meets the strict improve or maintain test. This test means avoiding impacts on areas of high conservation value and, in less sensitive areas, using biodiversity credits to counter-balance any unavoidable impacts.

The clearing of viable patches of endangered ecological communities will *not* meet the 'improve or maintain' test. There will be weightings to provide incentives for biobank sites to be located in areas of strategic conservation value, instead of leaving isolated and vulnerable patches scattered across the urban landscape.

The overall price paid for each credit will be determined by the market. A prescribed amount will be paid into the BioBanking Trust Fund when the credits are first sold to provide for payments back to the owner of the biobank site over a long period of time to assist with carrying out conservation management actions. The remaining amount of the sale price is agreed directly between the landholder and the credit purchaser and is paid directly to the landholder. In this way, both parties to the transaction receive something of value, and the environment is better protected.

BioBanking can most easily be explained using an example. Suppose a landowner lives on 200 hectares of land in the area that includes 150 hectares of Cumberland Plain Woodland in moderate condition. The landowner could voluntarily enter into a biobanking agreement whereby the 150 hectares becomes a biobank site. Actions by the landowner to control grazing, weeds and foxes for the protection of habitats and breeding of rare mammals and birds would, over time, improve its condition so that it becomes an area of high conservation significance. The actions will also generate 'biodiversity credits' that the landowner can sell.

Suppose also that a developer is proposing a new residential development, but that the building of the houses will impact on several isolated patches of low quality Cumberland Plain Woodland. Using the prescribed methodology, the developer could calculate the number of credits needed to offset the impact of the development, and apply for a biobanking statement which sets out the number and class of credits required. The developer could then purchase the required credits from the owner of the nearby biobank site.

The result in this example is that biodiversity and threatened species are better conserved on the biobank site for the long term, and land supply can be faster and cheaper. In addition, private landowners can access a new source of income from conservation.

Consultation to date

The Minister for the Environment, the Hon Bob Debus MP, introduced the Bill to the NSW Parliament on 8 June 2006, with the specific intention of undertaking consultation on the detail of the Bill. The consultation included a public forum, many detailed discussions with key stakeholders as well as considering numerous written submissions on the Bill.

Following some initial consultation in 2005 (at which time a Discussion Paper was also released), DEC established five expert groups in February 2006 to assist with the detailed design of the scheme as well as a review group, made up of some 200 stakeholders and potential future participants. The purpose of these groups was to draw in expertise to help develop the details of the scheme as well as build an understanding of the new biodiversity banking concept.

The Minister and DEC will continue to provide significant opportunities for public input and consultation in the development of the regulations and the biobanking assessment methodology (see below).

Proposed amendments to the Bill

The following amendments will be proposed by the Government as a result of the feedback received on the Bill:

1. Provide that, where a developer obtains a biobanking statement, that it will be conclusive for the purposes of considering the impacts on biodiversity required under the *Environmental Planning and Assessment Act 1979* (i.e. planning decision-makers cannot impose additional requirements in relation to threatened species).

2. Ensure that if a developer is unsuccessful in obtaining a biobanking statement that this is in no way prejudicial to the merits-based development assessment of the application under the *Environmental Planning and Assessment Act 1979* (i.e. it is *not* a relevant consideration by the consent authority in assessing the merits of the application).
3. Where impacts to biodiversity values will be of a temporary nature (for example, where rehabilitation is proposed following the carrying out of a development such as mining), provide for credits to be transferred and held by the Minister until the site has been rehabilitated when the credits would be released in line with the improvement to biodiversity values generated by the rehabilitation.
4. Provide a mechanism to substitute new credits where approved mining activities will impact on an existing biobank site. This requirement to provide alternative actions is consistent with similar arrangements that are used for public authorities.
5. Make clear that a biobanking agreement relating to Crown lands within the meaning of the *Crown Lands Act 1989*, including land dedicated for a public purpose under Part 5 of that Act, cannot be entered into without the consent of the Minister administering that Act.
6. Provide that a power to create a 'fit and proper person' test be included in the regulation-making powers. This will enable the accreditation of conservation brokers and landowners who sign up to a biobanking agreement. There will be consultation when this Regulation is prepared.
7. Enable the Land and Environment Court to make orders requiring purchase and retirement of biodiversity credits for breaches of biobank agreements, biobank statements and for other threatened species offences.
8. Make clear that a biobanking statement can be issued only if the project improves or maintains biodiversity values by removing a provision relating to Part 3A projects that allows a biobanking statement to be issued even if this test is not met (s 127ZG). This provision is unnecessary given the option for the Minister for Planning to approve a Part 3A project subject to acquiring and retiring biodiversity credits or complying with a biodiversity statement.
9. Clarify the meaning of 'improving or maintaining biodiversity values' by including clear principles in the legislation to guide the Minister for the Environment in approving the biobanking assessment methodology, as follows:
 - a. biodiversity values must be conserved across appropriate geographic scales (i.e. the relative importance of a site being assessed must be evaluated against regional and local conservation status and priorities);
 - b. all types of ecological communities must be adequately conserved (i.e. the relative scarcity of the ecological communities must be considered); and
 - c. areas conserved must be ecologically viable in the long term.
10. Require consultation with holders of covenants over land in the case of entering into or varying a biobanking agreement, to allow for the resolution of any issues between the biobanking agreement and the requirements imposed by the covenant.
11. Clarify the operation of proposed sections 127H and 127I of the Bill to ensure the Registrar-General registers biobanking agreements on title.
12. Require the Department of Environment and Conservation to obtain the concurrence of the Director-General of the Department of Planning prior to issuing biobanking statements in relation to:

- a. development that is inconsistent with current land-use zoning or that is incompatible with any applicable regional strategy;
 - b. subdivision development that involves a significant number of new lots, as specified in a regulation or SEPP; and
 - c. development that is located in coastal or other
13. Require a formal public review of the operation of the scheme after two years. The review will identify any changes that are needed to improve the operation of the scheme.
14. Remove the existing provisions that enable the Minister for Planning to make the scheme compulsory. This issue can be re-considered following the two-year trial.

Collaborative approach to implementation

DEC will continue to provide significant opportunities for public input and consultation in the development of the regulations and the biobanking assessment methodology. This will build on efforts to date to consult and involve key stakeholders in the scheme's development.

A Ministerial Reference Group (MRG) – on which all key stakeholders will be represented – will be established to assist in finalising the biobanking assessment methodology and regulations. The Group will also oversee implementation during the two-year trial and assist in the review of the scheme. The MRG will include representatives from environment groups, industry groups and catchment management authorities.

The biobanking assessment methodology will undergo rigorous testing involving stakeholders prior to commencement. This testing will include a number of worked examples of real properties to ensure that the methodology is practical, affordable and robust. The testing will occur over a minimum three-month period and will include opportunity for landowners to nominate sites on which to test the methodology and a series of workshops in which the MRG will review the application of the methodology to these sites and make recommendations on the methodology.

The final draft of the methodology will also be placed on public exhibition for comment before being finalised. It will then be published in the Gazette.

The regulations will be prepared in close consultation with key stakeholders. They will include:

- dispute resolution processes
- requirements for periodic review of the biobanking assessment methodology and consultation requirements
- provisions to ensure credits can only be created in respect of improvements to biodiversity values which are over and above existing minimum requirements and not where conservation benefits arise from government grants or recurrent funding

For example, land currently reserved under the *National Parks and Wildlife Act 1974* would be excluded from the scheme because that land is already managed primarily for conservation.

- the amount (by formula) to be paid into the Biobanking Trust Fund before the first transfer of a biodiversity credit

These funds are held on trust for the owner of the biobank site and provide an annual payment to assist in carrying out management actions.

Two-year trial period

Following commencement of the Bill, Regulation and biobanking assessment methodology, the scheme will be trialled for two years. It will be entirely voluntary.

During the trial period, the legislation will be fully operational to allow for a full examination of the scheme's effectiveness. This means biobanking agreements and biobanking statements will have the legal status provided by the Bill and trading in biodiversity credits can legally occur. If a person is participating in the scheme during the trial (e.g. by entering into a biobanking agreement or obtaining a biobanking statement), the requirements of the scheme will continue to apply and have legal force during and following the trial period.

With the benefit of practical experience, the two-year trial will allow for examination of all key operational issues.

Other key issues

Biobanking assessment methodology

The biobanking assessment methodology provides the basis for credit calculations, trading scope and rules. DEC has established an exceptionally strong team of scientists, economists and planners to work with the stakeholders and the forthcoming Ministerial Reference Group to develop the biobanking methodology.

The methodology will establish the minimum possible number of credit types, and the minimum necessary trading rules so that it can:

- implement a transparent robust 'improve or maintain' test based on the best available science
- enable gains and losses at development and biobank sites to be assessed at different times and independently
- ensure that biodiversity losses are offset for 'like for like or better' outcomes
- provide an assessment process that is objective, rapid and easy to use.

The final biobanking assessment methodology will be based on a refined version of the assessment methodology already being used by catchment management authorities for issuing property vegetation plans under the *Native Vegetation Act 2003*. Refinements to date include the integration of most individual threatened species into their associated ecological communities, the ability for independent assessment of credit calculation for development sites and biobank sites, and mechanisms for risk assignment between unrelated parties.

The 'improve or maintain' test itself will be set out in the biobanking assessment methodology, which will be part of the legal framework for the scheme. Clearing of viable patches of endangered ecological communities will **not** be permitted under the 'improve or maintain' test. For other areas, where credits can be used to offset impacts under the test, there will be strict rules ensuring that:

- credits are obtained from a biobank site with either the same ecological community as the development site or a more endangered ecological community; and
- the credits are obtained from a biobank site with the same threatened species predicted to occur as the development site.

Credits will be generated on a biobank site only where there is a commitment by the landowner to manage the land in such a way as to improve biodiversity values. These

commitments will be set out in the biobanking agreement between the landowner and the Minister for the Environment. Examples of conservation management actions that improve biodiversity values include removing weeds, controlling feral animals and managing fire and grazing to allow regeneration of plant communities.

Credits are calculated based on changes in condition and predicted responses of threatened species to management. Based on science, we know that improving biodiversity values is a lot more difficult than causing loss. The credit calculations take this into account. This means that simply setting aside one hectare and developing another hectare will not deliver offsets. Often an offset will require far more land to generate gains than the concentrated losses on a development site.

Integrating BioBanking with the planning system

BioBanking will provide a practical way to help reach the goal of improving or maintaining biodiversity in the Metropolitan Strategy and other regional strategies. It is recognised that developer contributions have been put in place for some of these strategies. Where such contributions are made for the purposes of biodiversity conservation, there will be a reduction in credit requirements to ensure there is no duplication of requirements.

BioBanking is also intended to be used as a part of certification of environmental planning instruments (such as local environmental plans). The Minister for the Environment is required to be satisfied of an improve or maintain outcome for biodiversity values before conferring biodiversity certification to an environmental planning instrument. Currently, DEC is working directly with a number of local councils to finalise local environmental plans for certification.

The Department of Environment and Conservation and the Department of Planning will continue to work closely together to ensure a consistent approach.

The new Part 3A of the *Environmental Planning and Assessment Act 1979* consolidates the assessment and approval regime for all major projects. In keeping with these aims, the Minister for Planning may require that biodiversity credits are acquired and retired as a condition of Part 3A project approvals to offset the impacts of the project. BioBanking will make such offset arrangements robust and transparent.

Integrating BioBanking with mining legislation

Mining companies will be able to voluntarily use the scheme to both establish biobank sites to generate biodiversity credits and provide secure conservation management arrangements for lands under their control, as well as using credits to offset development impacts.

As for other lands, mining interests can be granted over biobank sites and there is nothing in the Bill that expressly prohibits mining on a biobank site. The *Mining Act 1992* will apply to biobank sites in the same way it applies to mining over other land in NSW. This means that the Minister for Primary Industries, where permissible, can grant exploration licences and mining leases over any land including a biobank site, although in some circumstances the consent of the biobank site owner may be required. Authority to mine, however, also requires planning approval, where potential environmental impacts are considered.

The Bill already provides that the Minister must consult with the Minister for Primary Industries prior to entering into each biobank agreement. This will ensure that any implications for mineral extraction are considered prior to establishing land as a biobank site. Additionally, the Bill requires that the owners, lessee and mortgagee of land to consent to a biobanking agreement (127ZE).

The proposed amendments will also provide a mechanism to substitute new credits where approved mining activities will impact on an existing biobank site. The requirement to provide

alternative actions is consistent with similar arrangements that apply to public authorities. The amendments will ensure that biobank site owners are afforded the same protection and status as all other private landowners whose land may be affected by mining, and that any biodiversity losses that are caused by mining are fully offset.

Security of biodiversity outcomes

BioBanking will ensure that offsets are permanent. In the rare event where the biobanking agreement can no longer be fulfilled and has to be terminated, a new offset will need to be found for the original development AND a second new offset must be found for the terminated biobank site. Offsets will not be allowed to cause the current incremental destruction of habitat.

Integrating BioBanking with the *Native Vegetation Act 2003 (NV Act)*

The Bill has been designed to avoid duplication of the NV Act and excludes clearing regulated under the NV Act from being able to obtain a biobanking statement. The Bill does not affect or change the existing segregation of vegetation clearing assessments on rural land (which occurs under the NV Act) and urban land (which occurs under the *Environmental Planning and Assessment Act 1979*).

Biobank sites can, however, be established on any land, including land to which the NV Act applies. This means that any landholders that wish to voluntarily commit to undertaking positive management actions to improve biodiversity values under a biobanking agreement can sell credits. A practical limitation however, is that landholders who are located far from urban areas will be less likely to have the type of credits needed by urban developers because they will have been created in what might be a completely different ecosystem.

Catchment management authorities (CMAs) will have an important role in facilitating the supply of biodiversity credits under BioBanking through negotiating biobanking agreements with landowners (with the final agreement being signed off by the Minister for the Environment). The CMAs could also have a role in verifying the landowner's performance and recommending release of annual payments. DEC will continue to perform this role where a CMA is unwilling or unable to do this. Any other parties involved in negotiating credits will need to work closely with the relevant CMA to ensure there is no duplication of effort.

Financial considerations

The credit price is made up of two components:

1. an amount as specified by a formula in the regulations to be paid directly into the Biobanking Trust Fund by the purchaser of the credits and then held on trust and paid annually to the landowner to assist in resourcing ongoing conservation management actions; and
2. an amount agreed directly between the buyer and seller

The owner of the biobank site will suggest how much money is needed each year to manage the site when negotiating their biobanking agreement. DEC (which has extensive conservation land management experience) will check to ensure this is not an underestimate. The landholder can ask for more than the required minimum to be included within the annual payments, but is more likely to maximise revenue in the initial lump sum.

The amount set aside in the Trust Fund ensures that landowners have the money needed to carry out the management actions needed each year and it provides a financial incentive to landowners to carry out the management actions.

If the land is sold, the funds held in trust are payable to the new landowner so they can continue to carry out the conservation management actions. Biobanking agreements are to be registered on title and will bind both current and future landowners.

Biobank sites are exempt from land tax, but they are rateable by local councils.

Monitoring, auditing and enforcement

Biobanking agreements are to be registered on title and will bind both current and future landowners. In addition, there will be public registers of biobank sites, biobanking statements and biodiversity credits.

BioBanking provides a robust legal framework to protect offsets. This represents a substantial improvement from current laws, which do not prevent land set aside as an offset from being proposed for development at a later point in time. BioBanking also ensures these lands will be properly managed for conservation.

In the event that management actions are not properly carried out on a biobank site, there are a number of other enforcement provisions provided in the Bill.

These include:

- withholding of annual payments from the Trust Fund; or
- ordering the landowner to carry out the work; or
- undertaking the work and claiming the costs from the biobank site owner; or
- application to the Court for damages; or
- in extreme cases, the Minister for the Environment will be able to apply to the Land and Environment Court for the land to be transferred to a more responsible land manager.

DEC will also ensure that an effective compliance audit program will be put in place.
