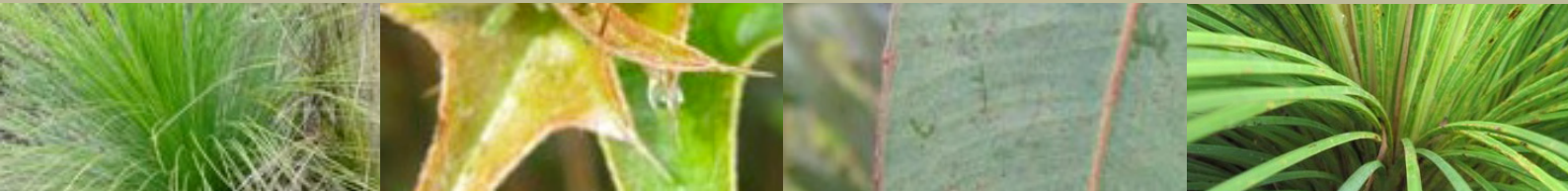




NEW SOUTH WALES
ABORIGINAL LAND COUNCIL

www.alc.org.au

What you need to know about **BioBanking**



The **BioBanking** Scheme is a way in which **Local Aboriginal Land Councils** (LALCS) can conserve existing biodiversity and protect the threatened animals, plants and ecosystems within their land.

General Introduction

This Fact Sheet provides information about the Biodiversity Banking and Offsets Scheme (Biobanking).

Please Note: While all care has been taken in the preparation of this Fact Sheet, it is not a substitute for legal advice in individual cases. The Fact Sheet is current as of March 2011.

What is BioBanking?

The NSW Government set up the Biodiversity Banking and Offsets Scheme (Biobanking Scheme) as a way of compensating for the loss of biodiversity resulting from development by providing offsets to help conserve biological diversity.

The scheme was established by the biobanking amendments to the *Threatened Species Conservation Act 1995* (TSC Act), which commenced in July 2008 and is an alternative to the need to have a threatened species assessment process conducted for development proposals.

The four key elements of the amendments are: establishing biobanking sites on land, creating biodiversity credits, trading of credits (once they are created and registered) and enabling credits to offset the impact of development on biodiversity.

How are biobanking sites established?

Biobanking sites are established through biobanking agreements between the Minister for the Environment, (the Minister) and landowners.

However, the landowner must meet certain criteria, including having native vegetation and / or threatened species on their property.

They are established after a landowner obtains ecological, economic and legal advice about a potential site of their land.

What is the purpose of biobanking?

The purpose of biobanking is to help conserve biodiversity through a system of credits and offsets.

The Office of the Environment and Heritage (OEH) believes this is important because of the threat posed to animals, plants and ecosystems in Australia by development (for housing, mining and other purposes).

This is because a development contributes to environmental degradation and habitat loss and poses a serious threat to biodiversity. Using the Biobanking Scheme, developers can 'offset' the damage caused to biodiversity by their projects through supporting conservation in the form of a biobank site.

What is Land Alive?

Land Alive provides opportunities for Aboriginal landowners to participate in the Biobanking Scheme.

In addition to biobanking there are opportunities for land management training, as well as mapping the land's natural values and biodiversity.

The program also aims to work closely with Aboriginal community to ensure cultural land management knowledge is valued by mainstream land managers.

How long does a biobanking agreement last?

A biobanking agreement will result in the conservation of the site in perpetuity. This means that the agreement lasts forever and so no development or land use that impacts on biodiversity can ever occur on the biobank site unless allowed in the agreement.



What is required of participants?

Landowners participating in the Biobanking Scheme agree to conserve the natural values of the biobank site on their land in perpetuity.

To do so they must undertake particular land management activities throughout the year, as detailed in the agreement.

They may also be required to abstain from activities on areas that adjoin the biobank site where such activities place the biodiversity values at risk.

Landowners must also comply with the requirements for reporting and document their management of the site.

Failure to meet these and any other commitments can have serious ramifications if warnings and meetings cannot resolve any compliance issues in the long-term.

A major breach of compliance could lead to the case being heard in the Land and Environment Court and could potentially result in loss of land.

How is the price of a credit determined?

The price of biodiversity credits is determined in accordance with part A and Part B costs. Part A is the 'Total Fund Deposit' and covers the estimated cost of management and reporting of the biobank site over the life of the agreement.

The amount for Part A is determined by the landowner for their unique site. They have the option to receive input from other land management experts and the amount will have final sign off by OEH.

Part B is known as the 'return to landholder', and is made up of the costs that a biobank site owner may seek to change when setting the price of their credits. These may include costs associated with establishing the biobank site, site assessment, preparation of management plans, land value, the opportunity cost and the return or risk margin.

Part B is determined by the biobank site owner, while considering the buyer of the credits. Some of these costs may be difficult to determine. For this reason it is important that Local Aboriginal Land Councils (LALCs) have legal and land valuation advice before signing any agreements. Any LALC will also need to obtain approval under the Aboriginal Land Rights Act 1983 from NSWALC.

What is the opportunity cost?

The opportunity cost is the value of an alternative use of land forgone because of the decision to set up a biobank site.

For example, the LALC may choose to set up a biobank site rather than develop the land for residential purposes.

The opportunity cost takes into account the market value of the land, stamp duty and the profit/risk margin and is considered when determining the Part B component of the credit price.

What is the Biobanking Trust Fund?

The Biobanking Trust Fund is managed by the Environmental Trust which is a separate legal entity that is independent from OEH. When credits are first sold, part of the sale price is paid into the Biobanking Trust Fund. The Fund invests this money and the income generated is used to make annual payments to landowners so they can meet the ongoing costs of managing the biobanking site.

How are payments made to landowners?

At first, all the money from the sale of the credit goes towards the Total Fund Deposit, which is set aside in a trust fund. The funds from the trust will be invested in the stock market, with a return on the investment paid each year.

However, once the amount of the Total Fund Deposit is reached, any further money from the sale of credits is profit for the landowner.

How long does the income stream last?

OEH advises that the income stream from the biobanking fund (Part A) will last forever.

This is because the funds from the trust will be invested in the stock market, with a return on the investment paid each year.

What if the trust fund account runs out?

If your account drops to less than 80% of the net present value then OEH will give you the option to either stop or reduce active management actions (higher cost actions such as fire management and replanting). Low cost or no cost management actions will still be required.

If funds in your account run out completely you will not receive any payments. You will still need to undertake passive management in accordance with your biobanking agreement that have minimal or no cost.

How does OEH ensure biobanking agreements are complied with?

Landowners are required to keep records and report annually to OEH. If biobank site owners do not meet the terms of their biobanking agreement then OEH can invoke sections 127L-0 of the TSC Act. Actions under these sections include court proceedings, seeking award of damages from biobank site owners for a breach of the biobanking agreement and the possibility of the Minister applying to the Land and Environment Court for the transfer of the biobank site to the Minister or to another person nominated by the Minister.

For further information about this see the Guide to establishing a biobank site:

<http://www.environment.nsw.gov.au/resources/biobanking/09336establishingbiobangsite.pdf>.

How do land owners submit an expression of interest?

OEH recommends submitting an expression of interest early on in the process using the biobanking website.

The form asks for details about the location, vegetation and threatened species present on the site. The expression of interest will be placed on a public register.

What obligations does an expression of interest in biobanking entail?

Submitting an expression of interest does not carry any obligations.

What is the OEH assessment methodology?

This is the way of determining the biodiversity value of the site, in order to determine the suitability of the site for biobanking and the number and type of credits.

Can landowners conduct a biobanking site assessment?

No, only an assessment by an accredited assessor will be considered in the application process.

However, landowners with a good knowledge of their land can use the biobanking credit calculator software program to make estimations.

Users record information about the natural values of the land into the program, such as vegetation and any threatened species.

The credit calculator can assist in estimating the number and type of biodiversity credits that a biobank could potentially generate. However, it does not indicate the price of the credits.



How can landowners access the credit calculator software?

The program is available to access online on the biobanking page of the OEH website: www.environment.nsw.gov.au/biobanking/calculator.htm.

How often will the site management plan be reviewed?

According to OEH, this will depend on the nature of the biobank site and the management actions required.

How often the landowner would like these to be reviewed will also be considered. The landowner can request to have their management actions reviewed at any time, particularly if the land is affected by incidents such as a bushfire.

Will there be an opportunity for landowners to participate in the review?

Yes.

What happens if the biobank site is affected by a natural disaster such as a bushfire?

If the site is affected by a fire or other phenomena, the obligation for the landowner is to continue to implement the land management actions as outlined in the agreement.

However, the impact of a natural disaster may be such that these actions will need to be changed to reflect the reality of the situation and any changes in priorities.

This will involve working with OEH which will consider possible changes on a case-by-case basis.

Does the biobank site need to be insured?

Yes. The estimated cost of insurance for the site will be included in the Part A Total Fund Deposit. Insurance is especially important in case the site is affected by bushfires or other natural disasters.

For example, if building a fence was among the agreed land management actions, and the fence was destroyed, repairs could be funded by insurance payments.

Can an agreement be varied after it has been signed?

Yes, it can be varied by establishing another agreement between the landowner and the Minister. The Minister must be satisfied that any changes do not have a negative impact on the biodiversity protected under the original agreement, or where there is a negative impact, that the landowner has taken specific measures to offset the negative impact.

This is a complex process which may require cancelling credits and/or purchasing and retiring credits from another biobank site as well as gaining the consent in writing from all property interest holders. There is also a fee associated with any changes. Landowners would need to obtain specific advice regarding any changes.

Can an agreement be terminated after it has been signed?

An agreement can be terminated by the landowner within the first three months of entry into it, or after five years, provided the landowner has neither sold nor retired any credits. The landowner will have to follow a specific termination process which includes paying a fee.



If landowners sign a biobanking agreement, do they still retain ownership of the land?

Yes. A biobanking agreement is registered on the land title so it will carry on for any subsequent owner as well.

What is the OEH Compliance Assurance Strategy and what does this mean for landowners?

The Compliance Insurance Strategy explains how the biobanking scheme will be implemented lawfully, equitably and transparently so that biodiversity values are conserved.

It aims to audit landowners' compliance with the management actions in the agreement. Failure to comply may lead to enforcement action, including legal action.

What penalties may apply for a breach of the biobanking agreement?

Any breach of the biobanking agreement could lead to severe consequence, including court proceedings and payment of costs.

The Minister may instruct the landowner to carry out work that is necessary to rectify a breach. If this is not complied with in a certain period, the Minister may enter the land to carry out these works and then take legal action in order to recover costs.

However, if there is a breach that places biodiversity values of the biobank site at serious risk, the TSC Act provides that the Minister can apply to the Land and Environment Court for an order to resume title to the land.

Could biobanking affect land rights?

Yes, although LALCs will retain ownership of the land they are legally bound to conserve the site as a biobank forever. This means that landowners are unable to determine future use of the land and restrictions on land use will apply. Biobanking also affects land rights because of a breach of the agreement may jeopardise ownership of the land.

What are the implications for cultural activities?

It is possible that conditions of biobanking agreements could limit activities such as fishing, hunting and gathering on biobanking sites.

The regulations do not explicitly prohibit such activities, but that there may be restrictions placed on specific agreements.

Therefore, it is important for LALCs to obtain legal advice in relation to any proposed agreement and how it may affect the conduct of such activities.

Permission to conduct activities may need to be incorporated into the agreement.

How does the *Aboriginal Land Rights Act* relate to the Biobanking Scheme?

LALCs are required to improve, protect and foster the best interest of all Aboriginal people in the area.

Depending on the facts of the case, biobanking may not be the best use of land for the community.

Therefore, a LALC must carefully consider whether biobanking is the best option to obtain income for the site.



Does NSWALC have to approve biobanking agreements?

Yes. Since biobanking is a 'use' of land, a LALC must obtain approval from NSWALC.

Any LALC considering entering into a biobanking agreement should contact the NSWALC Commercial Unit for assistance in relation to applying for a NSWALC land dealings approval under the *Aboriginal Land Rights Act*. More information on land dealings can be found on NSWALC's website at www.alc.org.au/land-councils/lalc-land-dealings.aspx.

What are the biobanking tax implications for LALCs?

Landowners are likely to be subject to capital gains tax and income tax, and in some situations, the GST. NSWALC encourages LALCs who are considering entering into a biobanking agreement to seek independent legal and taxation advice.

What is the nature of the 'fit and proper person criteria'?

Both parties to biobanking agreements are subject to the fit and proper person criteria. For LALCs, the relevant person would be the body corporate, however the Board members of the LALC may also be scrutinised.

The Minister is required to consider the criteria in making a decision and may consider a range of factors.

These include whether the person has contravened any relevant legislation, the competence of the person undertaking the land management activities and the financial capacity to comply with the agreement.

However, the criterion also takes into account issues of bankruptcy and insolvency, including whether the LALC may have had an administrator appointed during the previous three years.

What are the privacy issues associated with the 'fit and proper person criteria'?

Authorised officers are able to obtain information and records to investigate whether the LALC satisfies a fit and proper person test. There are various privacy issues associated with some of the inquiries to be made.

What happens if the Minister wants to resume the LALC land that is the subject of a biobanking agreement?

Section 42B of the *Aboriginal Land Rights Act* prevents the resumption or appropriation of land vested in NSWALC or a LALC except if the resumption or appropriation is done by an Act of Parliament. At present, it is unclear how the provisions of the TSC Act, which allow the Minister to resume the land subject to a biobanking agreement in certain circumstances, legally "fit" with section 42B of the *Aboriginal Land Rights Act*. As such, LALCs are advised to consider this issue carefully when contemplating whether they want to pursue biobanking on their land, as one possible outcome could be a resumption of the land.

What is the New South Wales Aboriginal Land Council's (NSWALC) position on biobanking?

NSWALC continues to explore biobanking within the context of a broader range of environmental and economically sustainable land use options.

NSWALC encourages all LALCs to critically evaluate the advantages and disadvantages of biobanking prior to entering into a biobanking agreement. This is important as biobanking agreements are in perpetuity and amongst other things may prohibit LALCs from using their land for other purposes.

For more information about the Biobanking Scheme contact:
NSWALC Policy & Research Unit on (02) 9689 4444 or biobanking@alc.org.au

