

Biobanking in NSW – Red light or red tape?

By Anneliese Korber¹

The second reading speech for the *Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006* (the **Biobanking Bill**) has promised

*'biodiversity conservation beyond the unproductive and frequently caricatured battles between housing and an endangered snail or between a shopping centre and an orchard.'*²

The Biobanking Bill was introduced into the Legislative Assembly on 8 June 2006 and aims to reduce the high rate of extinction of plant and animal species while avoiding red tape holding up development. Following the release of a working paper³ and more recently a background paper⁴, the Biobanking Bill amends the *Threatened Species Conservation Act 1995* (NSW) (the **TS Act**) and the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**) to introduce a biobanking scheme. The scheme is similar to the current Heritage Floor Space scheme implemented by Sydney City Council to allow a developer to purchase heritage floor space from an available register when their proposed development exceeds its permissible floor space ratio.

The Biobanking scheme has the following four key elements⁵:

1. the introduction of biobanking agreements between landowners and the Minister for Planning where the relevant land is suitable for biodiversity conservation (called a biobank site);
2. the creation of biodiversity credits for management actions carried out or proposed to be carried out on biobank sites that improve biodiversity values. Biodiversity values are defined to include composition, structure and function of ecosystems and includes, but is not limited, to threatened species populations, ecological communities and their habitats;
3. the formation of a market in biodiversity credits which can be traded and used to offset the impact of a proposed development on biodiversity values; and
4. the establishment of a biobanking assessment methodology to determine the number of biodiversity credits awarded for certain management actions (or proposed actions) and the number of biodiversity credits that must be retired (or offset) so that a development proposal either improves or maintains biodiversity values.

Biobanking will initially be voluntary. It will be available for any development under Parts 3A, 4 or 5 of the EP&A Act^{6,7}. How it aims to work is that a person who intends to carry out development for which biobanking is available may apply to the Director General of the Department of Environment and Conservation for a biobanking statement in respect of that development⁸. An application for a biobanking statement must be accompanied by the following:

- a description of the development to which the application relates;
- a statement of any on-site measures that are proposed to be taken in connection with the development to minimise the impact of the development on biodiversity values;
- an assessment of the impact or likely impact of development of biodiversity values prepared in accordance with the biobanking assessment methodology; and
- a statement of the number and class of biodiversity credits proposed to be retired to off-set the likely impact of the development on biodiversity values prepared in accordance with the biobanking assessment methodology⁹.

1 Lawyer, Property Environment & Planning Group, Henry Davis York, Sydney

2 Mr Bob Debus, Second Reading Speech, NSW Legislative Assembly Hansard, 8 June 2006

3 Department of Environment and Conservation (NSW) 'BioBanking - A biodiversity Offsets and Banking Scheme Conserving and restoring biodiversity in NSW Working Paper December 2005

4 Department of Environment and Conservation (NSW) 'BioBanking - An investigation of market-based instruments to secure long term biodiversity objectives' Background Paper January 2006

5 Explanatory Note to Biobanking Bill pg1

6 Other than clearing of native vegetation and development declared so by the regulations

7 Section 127ZE(1) of the Biobanking Bill

8 Note to Section 127ZD of the Biobanking Bill

The Director General is unable to issue a biobanking statement in respect of development that does not improve or maintain biodiversity values unless so directed by the Minister for Planning¹⁰. Developers must therefore ensure their applications for a biobanking statement correctly offset the impact of the development on the biodiversity values on the site with the appropriate number of biodiversity credits. Once the Director General has issued a biobanking statement, development that requires consent under Part 4 of the EP&A Act or an activity that requires approval under Part 5, is deemed not likely to significantly affect any threatened species population or ecological community under the TS Act or its habitat¹¹.

Considerable discretion is provided to the Minister in relation to the application of the Biobanking Bill to Part 3A projects. The Minister can direct the Director-General to issue a biobanking statement for any development that is a Part 3A project even if the development does not maintain or improve biodiversity values¹². Further, the Minister can require proponents for Part 3A projects to acquire or retire biodiversity credits irrespective of whether a biobanking statement has been obtained.

Biobanking may become mandatory for certain types of development if the Government decides to make a State environmental planning policy (SEPP). Such a SEPP may declare any development or class of development to be development for which biobanking is compulsory for the purposes of Part 4 or Part 5 of the EP&A Act¹³. A project to which Part 3A applies cannot be declared to be development for which biobanking is compulsory¹⁴. If biobanking is compulsory for a specifically defined class of development, a consent authority cannot grant consent to that development unless a biobanking statement has been issued in respect of that development under Part 7A of the TS Act¹⁵. Until a SEPP declares biobanking compulsory for certain development, and the biodiversity assessment methodology and any rulebook¹⁶ are released to regulate the new market, biobanking and biodiversity conservation in New South Wales will remain largely voluntary.

If enacted in its current form, the Biobanking Bill will add some complexity to the process of obtaining planning approvals. However, in the author's view, the Bill potentially increases certainty. Once a biobanking statement is issued, the effect on biodiversity as a question associated with the proposed development should largely be removed.

The Biobanking Bill will not be considered by Parliament until after the winter break to enable comments by interested parties.

10 Section 127ZF(3) of the Biobanking Bill

11 Sections 127ZI and 127ZJ of the Biobanking Bill

12 s127ZG of the Biobanking Bill

13 Schedule 2, Section 2 1, Clause [1] of the Biobanking Bill

14 Schedule 2, Section 2 1, Clause [1] (4) of the Biobanking Bill

15 Schedule 2, Section 2 1, Clause [7] of the Biobanking Bill

16 Department of Environment and Conservation (NSW) 'BioBanking - A biodiversity Offsets and Banking Scheme Conserving and restoring biodiversity in NSW' Working Paper December 2005 pg 9