

# BioBanking Compliance Assurance Strategy

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DECC 2008/346  
ISBN 978 1 74122 877 9  
July 2008  
Printed on environmentally sustainable paper

## Contents

<b>1</b>	<b>Purpose</b> .....	<b>1</b>
<b>2</b>	<b>Background</b> .....	<b>1</b>
<b>3</b>	<b>Scope</b> .....	<b>2</b>
<b>4</b>	<b>Compliance assurance</b> .....	<b>2</b>
<b>5</b>	<b>Elements of the strategy</b> .....	<b>3</b>
	5.1 Identifying the regulated community .....	3
	5.2 Establishing program priorities.....	3
	5.3 Promoting compliance .....	4
	5.4 Monitoring compliance .....	4
	5.5 Enforcement response to non-compliance .....	6
<b>6</b>	<b>Roles and responsibilities of other agencies</b> .....	<b>7</b>
<b>7</b>	<b>Scheme accountability and evaluation</b> .....	<b>7</b>



# 1 Purpose

This document outlines the approach of the New South Wales Department of Environment and Climate Change (DECC) to compliance assurance for the Biodiversity Banking and Offsets Scheme (the BioBanking Scheme). It details how DECC intends to direct its compliance assurance activities to ensure that the BioBanking Scheme is implemented lawfully, equitably and transparently so that biodiversity values in NSW are conserved, maintained or improved.

The objectives of DECC's compliance assurance activities are to:

- ensure the integrity of the BioBanking Scheme
- ensure compliance with legislative requirements
- provide transparency in DECC's regulatory approach
- increase consistency in regulation of environmental performance across NSW
- give the community confidence that DECC is an effective and credible regulator
- ensure that offences are detected and appropriate action is taken
- ensure that consistent principles are followed by staff in taking compliance and enforcement action.

This strategy details compliance assurance management actions that will apply to the BioBanking Scheme requirements, and outlines the mechanisms used to detect non-compliance and determine the most appropriate follow-up action. The strategy will help ensure that all parties participating in the BioBanking Scheme comply with their obligations under the scheme. Terminology is defined in a separately published glossary for the scheme.

## 2 Background

Conservation of endangered animals, plants and ecosystems is one of the greatest environmental challenges facing Australia today. The key reason for the historically high extinction rate of these animals, plants and ecosystems is habitat degradation and loss, initially from over grazing and clearing for agriculture and more recently from the clearing of native vegetation for urban development.

New provisions under Part 7A of the *Threatened Species Conservation Act 1995* (TSC Act), which established a BioBanking Scheme, came into force on 4 December 2006. The BioBanking Regulation contains further details of the operation of the scheme.

The BioBanking Scheme is a new initiative of the NSW Government that provides a streamlined biodiversity impact assessment process for development, a rigorous and credible offsetting scheme as well as an opportunity for rural landowners to generate income from conservation actions. The scheme operates under Part 7A of the *Threatened Species Conservation Act 1995*, the Threatened Species Conservation (Biodiversity Banking) Regulation 2008, and the BioBanking Assessment Methodology.

Credits are created when landowners enter binding perpetual commitments to actively manage their land's biodiversity values. The agreements are attached to their land's title, and include provisions that prevent current or future owners from undertaking development or activities in the future that would damage the land. When they sell their credits, a specified minimum amount of the sale proceeds is paid

into a trust fund, from which annual payments are made to the landowner in exchange for continued performance of the management agreement. This endowment runs with the land in perpetuity, benefiting current and then future owners.

Potential buyers of credits include developers or mining companies who wish to, or are required to offset the unavoidable impacts of their projects on threatened species. Governments or philanthropic organisations may also use the scheme to convert a one-off investment into a perpetually endowed conservation outcome. Buyers are free to select the location of the species types that they want to protect through their investments. The credit requirements for a developer are specified in their biobanking statement.

A new science-based, quantitative measurement tool has been developed to calculate the number of credits that are generated at each proposed biobank site. The same tool quantifies the biodiversity losses attributable to impacting developments. It is based on extensive data covering almost one thousand threatened species and ecological communities across NSW

### **3 Scope**

The BioBanking Compliance Assurance Strategy specifically deals with biobanking provisions in the *Threatened Species Conservation Act 1995* (TSC Act) and associated BioBanking Regulations.

### **4 Compliance assurance**

Compliance ensures that the outcomes envisioned through environmental protection and conservation are achieved and that the scheme protects the interests of those seeking to secure conservation outcomes through the purchase of credits.

DECC's compliance assurance activities are designed to improve the environment by increasing awareness and understanding of environmental issues and responsibilities, and invoking behavioural changes to achieve these. This strategy sets the framework for more detailed inspection and compliance audit programs under the scheme.

The compliance assurance mechanisms outlined in section 5 and utilised by DECC enable non-compliances to be identified in a timely manner and dealt with using a consistent, fair and equitable approach. These mechanisms include information packages, education campaigns, media releases, training programs, inspections, verbal or written warnings, notices to undertake remedial action, audits, investigations and enforcement responses involving penalties for non-compliance. These mechanisms might be used individually or in an escalating response where there is continued non-compliance.

In addition, persons making formal assessments in accordance with the BioBanking Assessment Methodology will need to be accredited by DECC. Accreditation will be periodically reviewed and renewed subject to compliance with the terms of accreditation. Should these requirements not be met, accreditation may be suspended or cancelled by DECC if necessary.

The Minister will also apply a fit-and-proper persons test to applicants for biobanking agreements to ensure that they have not contravened any environment protection or other relevant legislation and that in the opinion of the Minister they display appropriate qualities including good character, honesty and integrity.

DECC officers responsible for implementing the BioBanking Scheme will receive comprehensive training to ensure that they have the required knowledge and skills necessary to effectively and consistently regulate the scheme.

In addition, DECC will provide operational support to catchment management authorities, consent authorities and accredited persons involved in the implementation of the scheme. This includes ensuring that training and information materials are available and providing a Service Centre (help desk) to quickly respond to requests about biobanking, including the methodology, operational guidelines and any other issues that arise.

## **5 Elements of the strategy**

DECC's BioBanking Compliance Assurance Strategy addresses the following elements to ensure that it is effective and achieves the stated objectives:

- identifying the regulated community
- establishing program priorities
- promoting compliance
- monitoring compliance
- issuing enforcement responses to non-compliance.

### **5.1 Identifying the regulated community**

DECC will keep three registers relating to the BioBanking Scheme:

- the biobanking agreement register
- the biobanking statement register
- the biodiversity credits register.

Information contained on these registers will be used to effectively identify those with obligations under the scheme, including site owners and statement holders.

The biobanking agreement register will contain information on each site location, and on all biobanking agreements and required management actions. Credit availability, credit holders and details of suspensions, cancellations or retirement of credits are contained on the biodiversity credits register. Similarly, the biobanking statement register will contain copies of biobanking statements and application details for each statement.

These registers will be available for public inspection on DECC's website and at DECC's head office located at 59–61 Goulburn Street, Sydney.

### **5.2 Establishing program priorities**

The priorities of DECC's compliance assurance program will be set to reflect trends, patterns and issues of concern and to target areas that present the highest risk of biodiversity loss, taking into consideration the issues listed below. This strategy promotes a balanced approach to the regulation of biobanking activities by providing education and information and, in appropriate circumstances, taking the necessary enforcement measures for more significant breaches.

In order to ensure program integrity, priorities will be based on:

- issues which represent the greatest ecological harm
- the most effective use of resources to achieve the best biodiversity conservation outcomes
- community concern.

Information management systems are being developed for the BioBanking Scheme to assist DECC in identifying potential issues in a timely manner and to inform areas for future compliance activities. These systems will ensure that the correct credits for biobanking statements are retired before development work commences.

### **5.3 Promoting compliance**

DECC compliance programs offer a range of mechanisms discussed below to ensure that site owners and statement holders have access to program information and assistance. Compliance with the BioBanking Scheme will be encouraged by ensuring that site owners and statement holders receive clear information about the scheme requirements, why they are important, and what measures can be taken to assist them in complying.

Strategies to promote compliance will include:

- technical assistance through best practice guidance material, the BioBanking Assessment Methodology, and biobanking agreements that provide clear directions about DECC expectations and compliance information requirements
- information brochures, fact sheets and training workshops designed to encourage the transfer of knowledge between owners of biobank sites, to highlight the benefits of compliance, and to explain DECC's compliance requirements to owners of biobank sites and holders of biobank statements
- liaison with catchment management authorities, local councils and other government agencies, to facilitate access to information on biobanking requirements by scheme participants and local communities, and to integrate compliance assurance activities.

### **5.4 Monitoring compliance**

Owners of biobank sites will report compliance information to DECC for review and assessment and DECC will collect and assess further information through a range of compliance activities. This information will enable DECC to:

- ensure reliable and timely detection of non-compliances
- ensure that owners of biobank sites take steps to achieve and maintain compliance
- provide evidence to support enforcement actions
- provide compliance statistics to evaluate program progress.

Compliance information will be collected through public notification, monitoring, reporting and record-keeping carried out by biobank site owners, inspections and investigations conducted by DECC and other agencies (section 6) and through DECC compliance audit programs.

## **Public notification/complaints**

Complaints made by members of the public are an important means of detecting certain types of non-compliance and for highlighting areas or issues of concern. Public notification is particularly important in isolated areas where only neighbours situated in the immediate vicinity to properties may have regular visual or physical access.

## **Compliance responsibilities**

Site owners will be required to track and monitor their performance through record keeping, documentation and reporting of results to DECC for review and assessment. Site owners will be required to use established procedures and methods for data collection and to submit results to DECC within specified time frames.

Yearly reports submitted by the landowner demonstrating compliance with the biobanking agreement will be directly linked to annual payments from the BioBanking Trust Fund. The fund manager will only release the annual payment to the landowner when compliance with the obligations under the biobanking agreement has been confirmed.

## **Inspections**

Inspection programs are targeted to ensure that the information supplied to DECC is reliable and that data submitted to DECC is correct. Inspections create an enforcement presence, enable evidence collection, and help identify the need for further compliance assurance programs, including the undertaking of audits. Inspections can also help identify any future training and education needs for biobank site owners.

Inspections will be undertaken in a range of circumstances including:

- at any time during the application process for biobanking statements or agreements
- to check progress with management actions
- to verify compliance responsibilities are being met by site owners
- at any biobank site or land to which any biobanking statement applies.

## **Compliance audits**

Compliance audits are an independent, systematic, documented verification process that will be used to assess any or all of the requirements under the BioBanking Scheme, including the application of the BioBanking Assessment Methodology and determining compliance with management actions required by biobanking agreements. All audits include a monitoring component for follow-up actions on non-compliances identified. DECC's '*Compliance Audit Handbook*' provides general procedures and protocols designed to ensure a consistent approach to audits and can be found on DECC's internet site at:

[www.environment.nsw.gov.au/resources/licensing/cahandbook0613.pdf](http://www.environment.nsw.gov.au/resources/licensing/cahandbook0613.pdf)

A number of audit types will be used to assess compliance, including desktop audits, focused audits, and comprehensive audits.

*Desktop audits* A desktop audit is an effective method of assessing compliance where there is relevant documentation and information to be reviewed. Desktop audits may include:

- assessing information submitted to DECC
- contacting scheme participants to request the submission of further information
- determining that participants have provided the required reports or records to DECC
- confirming that reports provided to DECC contain all of the necessary information.

*Focused audits* Focused audits will be used to assess targeted activities, specific issues or areas of concern which may be related to a specific catchment, region, geographical area, species type or ecological community.

*Comprehensive audits* Comprehensive audits involve the assessment of all activities being undertaken. These types of audits will be used where there are concerns that a range of issues may require attention at a particular site.

## **Investigations**

Where non-compliance (at either a biobank site or a development site to which a biobanking statement applies) could result in legal action, investigations will be undertaken to identify the nature or circumstances of any possible breach and to collect evidence to prove the elements of the breach. This includes taking samples, photos, videos and witness statements. Prosecution Guidelines set out the factors taken into account in administering the State's environment protection legislation and can be found on DECC's internet site at

[www.environment.nsw.gov.au/legislation/prosguide/index.htm](http://www.environment.nsw.gov.au/legislation/prosguide/index.htm)

## **5.5 Enforcement response to non-compliance**

DECC will use a range of enforcement responses depending on the significance of the non-compliance and the risk that it poses to the lawful and credible operation of the scheme.

The significance of the non-compliance is related to the risk that the non-compliance poses. In escalating a formal enforcement response, risks can be determined by the following factors:

- the degree of or potential for ecological harm
- the severity of the breach
- the potential for recovery of the species or community
- whether wilful intent to commit a breach is identified
- whether the participant has a history of non-compliance
- whether the breach is ongoing
- whether there are any mitigating factors including natural or unforeseen events that are beyond the reasonable control of the landowner
- whether the breach poses a risk to the scheme's overall credibility.

These factors will help determine the most effective combination of action or response likely to be taken and the timeframe for which compliance must be achieved.

In most cases DECC will use an escalating response to non-compliance, including requests for remedial action, warning letters and inspections. However, for more serious non-compliance the BioBanking legislation also includes provisions to:

- withhold annual payments from the BioBanking Trust Fund if management actions have not been carried out
- enable the Minister to direct the owner of a biobank site to carry out work at their own cost to rectify a breach of a biobanking agreement
- suspend or cancel a biodiversity credit that has not been transferred
- allow DECC to enter the land and carry out necessary work where the owner has failed to comply with a Ministerial direction, to ensure compliance with the requirements of a biobanking agreement and recover the costs of conducting those works
- enable the Minister to make orders requiring the retirement of biodiversity credits of a specified number and class within a specified time frame to ensure compliance with a biobanking statement or biobanking agreement
- allow DECC to seek an award of damages against the owner of a biobank site for breaching a biobanking agreement
- apply to the Land and Environment court to have the land transferred to a more responsible land manager where a person has contravened a biobanking agreement.

## **6 Roles and responsibilities of other agencies**

DECC is responsible for issuing biobanking statements, approving biobanking agreements, and determining compliance with the requirements of the BioBanking Scheme and the management of all biobanking public registers.

DECC will liaise with local councils and consent authorities to ensure they understand their responsibilities, such as incorporating conditions relating to biobanking statements. DECC will also enforce non-compliance with a condition of development consent requiring retirement of credits (in accordance with a biobanking statement).

## **7 Scheme accountability and evaluation**

DECC has primary responsibility for the development, implementation and evaluation of the BioBanking Scheme.

During the first two years of the scheme's operation, 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 legislation, and trading in biodiversity credits can legally occur.

A review of the operation of the BioBanking Scheme will commence two years after the BioBanking Assessment Methodology is published in the NSW Government Gazette. The operation of the scheme will be monitored to provide information for use in the two-year review. This will also assist in informing stakeholders of how the

scheme is working in practice and, with the benefit of practical experience, the two-year review will allow for examination of all key operational issues.

The review process may consider:

- the extent to which the scheme is achieving its goal of maintaining or improving biodiversity conservation
- the cost-effectiveness of the scheme
- the compatibility of the scheme with other government outcomes including those under the State Plan, such as housing affordability and economic development.

The public will be given an opportunity to make submissions on the review, and the review report will be tabled in each House of Parliament within 12 months of the end of the two-year period.

The BioBanking Assessment Methodology will also undergo periodic review and a consultation process will be undertaken in relation to the review.

DECC will use a range of data to report on the performance of the scheme in achieving its objectives of conserving, maintaining and improving biodiversity values in NSW. This information will include the outcomes from compliance assurance programs and activities outlined in this strategy.