

**Threatened Species Conservation
Amendment (Biodiversity Banking)
Bill 2006**

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to establish a biodiversity banking and offsets scheme (the **biobanking scheme**).

The biobanking scheme has the following key elements:

(a) the establishment of biobank sites on land by means of biobanking agreements entered into between the Minister for the Environment and the owners of the land concerned,

(b) the creation of biodiversity credits in respect of management actions carried out or proposed to be carried out on or in respect of biobank sites that improve biodiversity values,

(c) a system that enables those biodiversity credits, once created and registered, to be traded (including by being purchased by developers) and used as an offset against the impact of proposed development on biodiversity values,

(d) the establishment of a biobanking assessment methodology, by order of the Minister published in the Gazette, for the purpose of determining both the number of biodiversity credits that may be created in respect of management actions or proposed management actions and the number of biodiversity credits that must be retired in connection with a development to offset the impact of the development and ensure that it improves or maintains biodiversity values.

The Bill provides for a procedure under which a person may apply to the Director-General of the Department of Environment and Conservation (**the Director-General**) for a biobanking statement in respect of a development proposal. If a biobanking statement is issued, it will not be necessary for the development to be assessed in accordance with the threatened species protection measures provided for by Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979*. However, the developer may be required to purchase and retire sufficient biodiversity credits to ensure that the impact of the development on biodiversity values is offset and to take other onsite measures to minimise any negative impact on biodiversity values. Biobanking statements may also be issued in respect of development approved under Part 3A of the *Environmental Planning and Assessment Act 1979*.

Initially, participation by developers in the biobanking scheme is optional. However, the Bill allows a State environmental planning policy to contain provisions that declare specified development or classes of development to be development for which biobanking is compulsory after an initial trial period for the scheme has elapsed.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Threatened Species Conservation Act 1995* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to consequential amendments to other Acts and legislation set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced, the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Threatened Species Conservation Act 1995

Principal amendment

The principal amendment is **Schedule 1 [6]**. It inserts a new Part 7A in the *Threatened Species Conservation Act 1995* which contains key provisions relating to the biobanking scheme.

Preliminary matters

Division 1 of proposed Part 7A contains definitions, and provides for the establishment of a biobanking scheme with the key elements described in the overview. It also provides for the establishment of a biobanking assessment methodology. The methodology, which is to be established by order of the Minister published in the Gazette, will contain rules with respect to the following:

- (a) the actions or proposed actions in respect of which biodiversity credits may be created (**management actions**), being actions that will improve biodiversity values,
- (b) the creation of biodiversity credits or different classes of biodiversity credits in respect of management actions carried out, being carried out or proposed to be carried out on or in respect of biobank sites,
- (c) the circumstances in which development is to be regarded as improving or maintaining biodiversity values, including where the impact of that development is offset against the impact of management actions for which biodiversity credits are created,
- (d) any impact on biodiversity values that cannot be offset by the retirement of biodiversity credits.

This methodology will be used as both the basis for calculating the number of biodiversity credits that may be created in respect of management actions and the number of biodiversity credits that must be retired in respect of development.

Biobanking agreements

Division 2 of proposed Part 7A provides for biobanking agreements. These are agreements entered into between the Minister and land owners that designate land to be a biobank site. The agreements will require or authorise the land owner to carry out management actions in respect of the land. Biodiversity credits may be created in respect of management actions carried out, being carried out or proposed to be carried out on the land in accordance with the biobanking agreement and the biobanking assessment methodology.

Biobanking agreements are registered on title to land and generally have effect in perpetuity. The agreements are binding on the owner (including successors in title to the owner) and the Minister. They may be varied or terminated in limited circumstances. Generally speaking, the obligations can be varied or terminated only if the variation or termination does not have a negative impact on the biodiversity values protected by the agreement. If the variation or termination does have a negative impact, the Minister may require appropriate measures to be taken to offset any negative impact of the variation or termination on the biodiversity values protected by the agreement (such as the cancellation or retirement of biodiversity credits).

Management actions carried out under a biobanking agreement are exempt from the requirement for development consent or environmental assessment under the *Environmental Planning and Assessment Act 1979*, unless otherwise provided by the regulations.

Biobanking agreements may be enforced (by any person) by action taken in the Land and Environment Court. The Bill also confers other enforcement powers on the Minister and Departmental officers.

A biobanking agreement may not be suspended under the *Environmental Planning and Assessment Act 1979* to enable development to be carried out on a biobank site

except with the concurrence of the Minister to the suspension. The Bill also contains special provision for dealing with proposals by public authorities affecting biobank sites.

Creation of biodiversity credits

Division 3 of proposed Part 7A provides for the creation of biodiversity credits. Biodiversity credits are created by the Director-General, on application of the owner of a biobank site, in respect of management actions carried out, being carried out or proposed to be carried out on a biobank site.

A biodiversity credit may be created only in respect of a management action carried out, being carried out or proposed to be carried out on a registered biobank site. Entry into a biobanking agreement leads to an automatic entitlement to the registration of the biobank site. However, the Director-General may suspend or cancel registration if a biobank site owner breaches any conditions of a biobanking agreement or contravenes a provision of proposed Part 7A or the regulations under the Part. If registration is suspended or cancelled, the obligation to carry out the management actions required in respect of the biobank site continues, even though the owner ceases to be entitled to create biodiversity credits.

The Bill sets out a procedure under which biobank site owners may apply to the Director-General for the creation of a biodiversity credit. The number of credits and class (if any) that may be created is determined in accordance with the biobanking assessment methodology and the relevant provisions of the biobanking agreement. Once created, a credit remains in force unless it is cancelled or retired under the scheme.

Trading in biodiversity credits

Division 4 of proposed Part 7A provides for trading in biodiversity credits. Once created, a biodiversity credit may be transferred to any person subject to the regulations. The regulations may require an amount to be paid, on the first transfer of a biodiversity credit, into a fund called the Biobanking Trust Fund (the purpose of the Fund is explained below). Transfers of biodiversity credits have effect when registered under the scheme. Other transactions in biodiversity credits may be permitted by the regulations.

Cancellation, suspension and retirement of biodiversity credits

Division 5 of proposed Part 7A provides that a credit may be cancelled by the Director-General because of a wrongdoing by the person who applied for the creation of the credit or for other specified reasons. The Director-General may also cancel a credit at the request of or with the consent of the holder of the credit.

The Director-General may suspend a credit, for a period of up to 2 months, pending an investigation into whether there are grounds for cancelling a biodiversity credit.

A biodiversity credit cannot be traded or retired during any suspension period.

The Bill also provides for the retirement of biodiversity credits. A biodiversity credit may be retired when it is used as an offset in connection with a development proposal (see below), retired voluntarily or retired for the purpose of complying with a direction given to a person under proposed Part 7A. A biobank site owner (or former owner) may be directed to retire credits in certain circumstances because of a wrongdoing by the person under the scheme. Failure to comply with such a direction carries a maximum penalty of 5,000 penalty units (currently \$550,000).

Biobanking statements

Division 6 of proposed Part 7A provides for the issue of biobanking statements. A biobanking statement may be issued in respect of development and activities to which Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* apply and projects to which Part 3A of that Act applies, unless the development concerned requires approval under the *Native Vegetation Act 2003* or is excluded by regulations.

The Bill sets out a procedure for applying for a biobanking statement in respect of a

development. The application is required to include an assessment of the impact or likely impact of the development on biodiversity values, prepared in accordance with the biobanking assessment methodology, and a description of the biodiversity credits proposed to be retired to offset that impact or likely impact. An applicant for a biobanking statement is also required to demonstrate that all cost effective onsite measures to minimise the impact of the development on biodiversity values are being or will be carried out.

The Director-General may issue a biobanking statement only if the development will improve or maintain biodiversity values. A development is to be regarded as improving or maintaining biodiversity values only if a determination is made by the Director-General, on the basis of an assessment of the development in accordance with the biobanking assessment methodology, that the development will improve or maintain biodiversity values. The Director-General may issue a biobanking statement in respect of a development that does not improve or maintain biodiversity values only if directed to do so by the Minister. (The Minister is authorised to give such a direction only in relation to projects under Part 3A of the *Environmental Planning and Assessment Act 1979*.)

A biobanking statement is to describe the development to which it applies and any conditions applicable to the issue of the statement. The conditions may include conditions as to onsite measures required to minimise the impact of the development on biodiversity values, and a credit retirement condition. A credit retirement condition is a requirement to retire biodiversity credits specified in the statement, in accordance with a timetable also specified, as an offset against the impact of the development on biodiversity values.

If a biobanking statement is issued in respect of a development, the development is not required to be assessed in accordance with the threatened species assessment provisions contained in Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979*, and the provisions for consulting with, or obtaining the concurrence of, the Minister for the Environment and the Director-General in relation to a development do not apply. However, the development or activity must be consented to, approved or carried out under that Act subject to the conditions of the biobanking statement.

The Bill provides for the modification and revocation of biobanking statements.

Biobanking statements will lapse (unless sooner revoked) at the end of the period of 2 years after issue if no further action under the *Environmental Planning and Assessment Act 1979* has been taken in respect of the development.

The Minister may make an order directing a person to retire credits in accordance with a condition of a biobanking statement if a credit retirement condition is not complied with. Failure to comply with such a direction carries a maximum penalty of 10,000 penalty units (currently \$1,100,000).

The Director-General may issue a statement verifying that biodiversity credits have been retired in accordance with a credit retirement condition.

Financial matters

Division 7 of proposed Part 7A provides for the establishment of a fund called the Biobanking Trust Fund. The purpose of the Fund is to provide funding for the management actions carried out by land owners under biobanking agreements. It is intended that the main source of revenue for the Fund will be a requirement, imposed by regulations, that a specified amount be paid into the Fund whenever a biodiversity credit is first sold or transferred. The money will be paid to owners of biobank sites from the Fund in accordance with arrangements specified in biobanking agreements. The Bill provides for other amounts that may be paid into, or out of, the Fund. It also makes provision in respect of the management and control of the Fund by a Fund Manager appointed by the Minister.

The Bill enables the regulations to require participants in the biobanking scheme to pay a contribution towards the costs of management and administration of the

scheme, the costs of ensuring compliance with the scheme and other costs relating to the scheme. Participants in the scheme include biobank site owners, holders of biodiversity credits, persons who apply for or are entitled to act on biobanking statements and persons accredited as conservation brokers under the scheme. The Bill provides for the establishment of a separate account in the Treasury called the Biodiversity Banking Account to provide for the costs of administration of the scheme.

Registers

Division 8 of proposed Part 7A provides for the establishment of the following registers, to be kept by the Director-General:

- (a) a register of biobank sites,
- (b) a register of biodiversity credits,
- (c) a register of biobanking statements.

The Division provides for evidentiary matters relating to the registers and for correction of the registers.

Miscellaneous

Division 9 of proposed Part 7A provides for appeals to the Land and Environment Court against various decisions that may be made under the new Part.

The Division also makes provision for the participation of conservation brokers in the scheme and the participation of the Minister. The Minister, Director-General and department officers are exempted from liability for things done in good faith under the scheme. The Division also provides for the making of regulations in connection with the scheme, and exempts those regulations from staged repeal requirements under the *Subordinate Legislation Act 1989*.

Other amendments

Schedule 1 [1] and [2] provide for a new definition of ***biodiversity values***. The purpose of the new definition is to emphasise that biodiversity values include the composition, structure and function of ecosystems (and not just individual threatened species, populations and ecological communities).

Schedule 1 [3] and [4] are consequential amendments to the provisions of the *Threatened Species Conservation Act 1995* relating to biodiversity certification of environmental planning instruments. These amendments make it clear that biodiversity certification may be granted subject to conditions that limit it to certain types of development and that the certification does not apply to any development declared by a State environmental planning policy to be development for which biobanking is compulsory.

Schedule 1 [9] allows proceedings for offences under the *Threatened Species Conservation Act 1995* to be taken in the Land and Environment Court (in addition to the Local Court). This is consequential on the amendments contained in the Bill that provide for significant penalties for breaches of requirements made under the scheme.

Schedule 1 [5] and [8] repeal and re-enact a provision of the *Threatened Species Conservation Act 1995* relating to the accreditation of persons to prepare assessments and surveys. The purpose of the change is to allow the accreditation provisions to be extended to the biobanking scheme.

Schedule 1 [7] provides for a renumbering of provisions.

Schedule 1 [10] enables the making of savings and transitional regulations.

Schedule 1 [11] provides for savings and transitional matters.

Schedule 2 Amendment of other Acts and legislation

Amendments to Environmental Planning and Assessment Act 1979

Schedule 2.1 [1] enables the making of a State environmental planning policy that declares any development or class of development (being development for which biobanking is available) to be development for which biobanking is compulsory under Part 4 or 5 of the *Environmental Planning and Assessment Act 1979*. Such a

State environmental planning policy is not to be made until a period agreed between the Minister administering that Act and the Minister administering the *Threatened Species Conservation Act 1995* has elapsed since the establishment of the scheme, and the Minister administering the *Threatened Species Conservation Act 1995* certifies that the development concerned is suitable to be treated as development for which biobanking is compulsory. Projects to which Part 3A of the *Environmental Planning and Assessment Act 1979* applies cannot be declared to be development for which biobanking is compulsory.

If development is declared to be development for which biobanking is compulsory,

Schedule 2.1 [7] and [13] provide for the following consequences:

(a) if the development is development that requires consent under Part 4 of the *Environmental Planning and Assessment Act 1979*—the consent authority must not grant consent to the development unless a biobanking statement has been issued, and must grant consent subject to the conditions of the biobanking statement,

(b) if the development is an activity for which a determining authority is granting approval under Part 5 of the *Environmental Planning and Assessment Act 1979*—the determining authority must not grant the approval or carry out the activity unless a biobanking statement has been issued and must grant the approval, or carry out the activity, subject to the conditions of the biobanking statement.

Schedule 2.1 [2] allows the Minister administering the *Environmental Planning and Assessment Act 1979*, when granting approval to a project under Part 3A of that Act, to require the proponent of the project to acquire and retire biodiversity credits in respect of the project (whether or not a biobanking statement is obtained). The Minister may also require the proponent to obtain a biobanking statement and to comply with the conditions of the statement.

Schedule 2.1 [3] provides that a State environmental planning policy that declares development to be development for which biobanking is compulsory does not apply in respect of a Part 3A project that is dealt with (following approval of a concept plan) under other Parts of the *Environmental Planning and Assessment Act 1979*.

Schedule 2.1 [8] and [9] prevent a consent authority from making any significant modifications to a development consent granted in relation to development for which a biobanking statement was issued, unless a new biobanking statement is obtained.

Schedule 2.1 [10] requires a determining authority that assesses an activity under Part 5 of the *Environmental Planning and Assessment Act 1979* to have regard to the impact of the activity (if any) on a biobanking agreement.

Schedule 2.1 [4], [5], [6], [11] and [12] insert notes in the *Environmental Planning and Assessment Act 1979* to assist in identifying the interaction between the provisions in that Act and the provisions to be inserted in the *Threatened Species Conservation Act 1995*.

Amendments to Environmental Planning and Assessment Regulation 2000

Schedule 2.2 makes it clear the requirements in respect of a development application for which a biobanking statement has been issued are modified (so that an indication of the effect of the development on threatened species, populations or ecological communities, or their habitats, or a species impact statement is not required).

Amendments to Land and Environment Court Act 1979

Schedule 2.3 makes consequential amendments to the *Land and Environment Court Act 1979* to allocate appeals and other proceedings under the new provisions of the *Threatened Species Conservation Act 1995* to the appropriate class of jurisdiction of the Court.

Amendments to Land Tax Management Act 1956

Schedule 2.4 exempts biobank sites from land tax (in a manner similar to the

treatment of conservation areas under the *National Parks and Wildlife Act 1974*).

Amendments to National Parks and Wildlife Act 1974

The amendments in **Schedule 2.5** are consequential on the creation of a separate account to cover the costs of administering the biobanking scheme. The amendments ensure that the account is separate from the account kept under the *National Parks and Wildlife Act 1974*.