

NSW



**DEFENDING THE ENVIRONMENT
ADVANCING THE LAW**

Submission the Review of the NSW Biodiversity Banking and Offsets Scheme

prepared by

**EDO NSW
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Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

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Introduction

EDO NSW welcomes the opportunity to provide comment on the Review of the NSW Biodiversity Banking and Offset Scheme (**Biobanking**). EDO NSW has engaged in the development and analytical assessment of the scheme for a number of years. This submission draws on our previous submissions¹ and our contributions to the Ministerial Reference Group for Biobanking.

We appreciate the efforts by OEH to meet with us and discuss the proposed changes, particularly on the details of the assessment methodology. Our comments have been prepared with input from the EDO NSW science team.

When the legislation establishing biobanking was passed, EDO NSW strongly supported an amendment requiring a review of the scheme. As the scheme was new, innovative and experimental, we deemed it essential that mechanisms were in place to require detailed analysis of the scheme's development. The fundamental question for review is whether the scheme provides a transparent and rigorous system whereby biodiversity values that are impacted are actually maintained or improved by retiring offset credits.

Instead of objectively assessing this fundamental goal, the information released for the purpose of the review focuses on pre-determined amendments designed at "streamlining" the operation of the scheme. The proposed amendments to the methodology include: decreasing survey requirements, increasing amount of land considered to be in low condition and therefore amenable to offsetting, increasing arbitrary thresholds for viability (from 4ha to 10 ha), weakening 'like for like' requirements to the extent of actually allowing trading between vegetation formations, and facilitating easier variations of red flag areas. The overriding aim seems to be to make the scheme cheaper to encourage more developers to use the scheme, and justify its continuation. However, these amendments cannot be justified ecologically.

We acknowledge that biobanking has always involved a balancing act – to make a scheme that is both ecologically rigorous but also user friendly. If the amendments proposed by the Review are accepted, then this balance is no longer achieved. Such an unbalanced scheme cannot be supported.

In contrast, EDO NSW submits that this review presents an opportunity to establish a best practice ecologically robust standard for offsetting. Ensuring best practice is absolutely crucial if the scheme is to continue, and if the methodology is to be used more broadly under planning and native vegetation laws in NSW, and under biodiversity conservation laws nationally.

¹ EDO NSW submissions on biobanking are available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#2. For example, see: *Submission on proposed amendments to the Biobanking Assessment Methodology*, 19th November 2010.

Our submission relates to the following core aspects of the review, as outlined in the Biobanking Review: Discussion Paper (**Discussion Paper**) (p1):

- Performance and cost effectiveness of Biobanking
- The extent to which the scheme is achieving its goal of maintaining or improving biodiversity conservation
- The operation and use of the Biobanking Assessment Methodology (**BBAM**) and its relationship with similar methodologies
- The scheme framework including matters associated with biobanking agreements, statements and transactions, the Trust Fund and assessor accreditation
- Ensuring the scheme can respond to the outcomes of the NSW planning system review, and the EPBC Act review.

1. Performance and cost effectiveness of Biobanking

In terms of *performance*, we agree that as the scheme is in its infancy it is difficult to assess Biobanking fully due to the small number of biobank sites, biobanking statements and trades completed to date. It is appropriate that any new and innovative scheme requires time to be properly developed and considered. We acknowledge that the voluntary nature of biobanking has meant that many potential participants have simply opted for the more familiar path of EIA under current planning laws. Obviously this would change if proponents were *required* to use the biobanking scheme. The EDO NSW would only support the scheme being mandatory if it involved the use of a truly objective best practice assessment methodology. The proposed amended methodology is not such a tool. (This is discussed further below).

In relation to *cost-effectiveness*, we do not provide comment in relation to costs for scheme participants, but as a general observation. EDO NSW is deeply concerned that cost-effectiveness has become the overwhelming policy driver for the review process. This is evidenced by the fact that most of the proposed changes are geared towards streamlining the assessment of ecological considerations for the purpose of reducing credit requirements and costs. (This is discussed further below). We submit that the fundamental question for the review is not whether a reasonably priced scheme is in place, but whether a scientifically robust scheme that can maintain or improve environmental outcomes is in place.

At the commencement of Biobanking, EDO NSW recommended what data should be assessed and made available in the two year review.² Some of the data requested have been provided in the Discussion Paper, but there is limited detail. The Discussion Paper claims it is too early to provide all the data, and EDO NSW is concerned that this potentially indicates that it will never be possible to accurately quantify the success/failures of biobanking from an ecological perspective. In the absence of ecological outcomes data, it is not appropriate to use financial figures or assessment timelines as a proxy for the success of the scheme.

² This advice was provided through the MRG process.

Recommendations: In the Review process, no amendments should be made to reduce costs that undermine the ecological integrity of the scheme.

The scheme must not be made mandatory unless it requires the use of a truly objective scientifically rigorous and ecologically justified assessment methodology.

A process should be put in place to more effectively collect and analyse environmental outcomes data.

2. The extent to which the scheme is achieving its goal of “maintaining or improving biodiversity conservation”

EDO NSW submits that this is the most important aspect of the Biobanking Review. All other aspects of the scheme are secondary to reviewing whether the scheme meets/or is designed to meet the fundamental goal of maintaining or improving biodiversity values.

As is clear in discussions with OEH and in the Review papers, there is a clear intent to make amendments to biobanking that assume general conservation outcomes are sufficient to meet the ‘maintain or improve’ test, rather than prescribing precise biodiversity outcomes. This is inconsistent with the TSC Act. The TSC Act refers to maintaining or improving biodiversity *values*, whereas the Discussion Paper asks whether the scheme is improving or maintaining ‘biodiversity *conservation*’ more generally.

The legislative test to maintain or improve biodiversity values is implemented by applying the BBAM. Therefore, the extent to whether the scheme is achieving the goal is dependent on the ecological integrity of the BBAM.

The current version of the BBAM is not perfect. EDO NSW agrees that it is a complex tool and that there are ways to potentially simplify it without weakening environmental protections.

The current tool already contains a number of sections that make achieving a ‘maintain or improve’ goal more ‘flexible’ when applied to specific biodiversity values. For example, the provisions in the current version of the BBAM that allow for variation of red flag areas can result in the specific impacts of a development not actually being precisely offset. The tool already allows a more broad, general offset in some circumstances. While this could equate to a gain in biodiversity value A and ‘biodiversity conservation’ broadly, it will almost certainly result in a net loss of biodiversity value B.

Provisions allowing indirect offsets for biodiversity conservation more broadly, do not meet the legislative test of maintaining or improving biodiversity values.

This issue goes to the heart of the controversy and scientific debate about biodiversity offsetting. While the tool contains mechanisms to vary results and allow offsets that are not ecologically equivalent, a strict ‘maintain or improve biodiversity values’ test cannot be met. In this context, it is more accurate to call biobanking a compensation scheme or an environmental contributions mechanism, rather than a scheme that actually offsets values.

As noted above, the proposed changes to the BBAM seriously erode the ecological integrity of the tool to an unacceptable level. If the proposed amendments are agreed to, the scheme will not maintain or improve relevant biodiversity values. This in turn, further weakens the meaning/interpretation of the legislative 'maintain or improve test.' This has profound implications for Biobanking, but also implication for application of the 'maintain or improve test' in other legislation. (This is discussed further below).

Recommendations: Amendments are needed to the BBAM to ensure that the specific biodiversity values that are impacted are maintained or improved by retiring of relevant credits.

The majority of the amendments that are proposed to 'streamline' the BBAM result in a weakening of the 'maintain or improve' test and should not be made.

3. The operation and use of the Biobanking Assessment Methodology (BBAM) and its relationship with similar methodologies

Implications for other methodologies

There are significant implications of this Review for other assessment methodologies. The weakening of the biobanking methodology (on the pretext of increasing use) could result in the significant weakening of the EOAM under the Native Vegetation regulatory regime. Each of the current methodologies, while incorporating similar elements, was designed for differing purposes. The native vegetation tool consequently has strict requirements for on-property like for like offsets. The biobanking methodology was developed with much more focus on the creation of fungible biodiversity credits in a broader market. The biocertification methodology was designed to apply at a landscape scale. While it is logical to have consistency in assessment methods – for reasons of certainty and equity – EDO NSW is concerned that the weakest version of the tool will create a lowest common denominator effect. The various reviews currently present an opportunity to establish a rigorous, objective best practice tool.

Proposed changes to the methodology

We note that the Biobanking Review process began with an internal review and consultation with MRG stakeholders on some 'streamlining' amendments. We have two main concerns: first, the proposed amendments are pre-empting the public review process. The documentation provided as part of the review process directs the focus of the review to the range of proposed amendments to the scheme, rather than an objective evaluation of the scheme itself as required. Proposals for amendment should be based on feedback from the review process and not already decided by the Department. Second, the Discussion Paper infers that there was stakeholder support for the proposed changes, and does not acknowledge that some proposed amendments were not supported. EDO NSW and TEC made a detailed submission at this time.³

³ EDO & TEC Submission on proposed amendments to the Biobanking Assessment methodology, 19th November 2010.

Most of the 'streamlining' amendments as proposed in 2010 have remained, despite being ecologically unjustifiable. There are at least 26 proposed changes to the methodology. The majority of the changes decrease number of credits generated at a development site and increase the number of credits generated at a biobank site. This is done in many ways, and the impact may be significant.

The rationale for the proposed changes seems to be two-fold. First, the changes are designed to decrease the complexity of the methodology. The EDO NSW does not agree that this justifies significant 'streamlining' reforms. Assessing biodiversity values is necessarily going to involve some complexity as it is a difficult ecological task. As such, there needs to be a sufficient level of technical detail and requirement in the tool for it to have ecological integrity. Furthermore, significant training is required for accredited assessors, in order for them to understand and apply the complex concepts. The second rationale for the proposed changes appears to be to reduce the number of credits required by developers. As noted above, making the scheme financially cheaper must not be the policy driver for reform.

Consistent with our previous comments we reiterate our concerns and make the following specific comments on the proposed changes to the BBAM.⁴

- **Ecological equivalence** – EDO NSW has consistently submitted that offsets must be 'like for like'. We note the existing tool allows some flexibility by including trade with species/communities of 'equivalent scarcity' that is not strictly like for like. However, the proposed amendments depart from this fundamental principle completely by allowing trading *between vegetation formations* (p51), and by permitting indirect offsets. These amendments cannot be justified ecologically and are strongly opposed. This issue goes to the whole integrity of the scheme.
- **Low condition** – amendments that result in more land being designated as "low condition" (p33) mean that more land will be amenable to variation and offsetting. EDO NSW does not support this change. Red flag areas are fundamental to the integrity of the scheme and this weakens the protections.
- **Red flags** – While this terminology is specific to NSW and requires explanation in other contexts (for example, national offsets policy work), the semantics are important. The term 'red flag' gives a clear indication to developers that there are certain areas where offsetting is not possible and not appropriate. This is fundamental for the scheme to remain consistent with the TSC Act. To remove the term 'red flag' (p32) removes that upfront indication that offsetting is not appropriate, and gives the impression that everything is amenable to an offsets negotiation. The BBAM must contain clear unambiguous language identifying where offsetting cannot occur.
- **Minor variations** – EDO NSW does not support variations to results of the methodology (we note 50% of statements have applied for variations to date). This undermines the whole rationale of applying an objective consistent and repeatable tool. If a variation mechanism is deemed necessary for very limited circumstances, the variation process must be set out in Regulation (as per the Native Vegetation

⁴ Page numbers refer to pages in the OEH Draft methodology exhibited for comment.

Regulation), and not part of the BBAM itself. EDO NSW therefore opposes the variation mechanism proposed within the tool (p54).

- **Arbitrary viability threshold** – EDO NSW strongly opposes the arbitrary viability threshold as this has significant implications for certain species and communities that only remain in fragmented remnants. We therefore strongly oppose the increase from 4ha to 10 ha (p34). Not only is this the death knell for certain communities, but it is also inconsistent with national standards for federally listed species such as Cumberland Plain woodland. This is a good example of where a weakened NSW standard would not be able to be accredited federally.
- **Survey requirements** - The reduction in survey requirement (p5) should be subject to ongoing testing to accurately assess whether reduced requirements are producing the same result. The key driver for this seems to be reducing costs for developer of getting an assessment done not ecological accuracy. It must be clearly and consistently demonstrated that reduced effort does not compromise the accuracy of assessments.
- **Threatened species credits** - By removing the threatened species as a driver for credit generation for ecosystem credits (p38) means that assessors have discretion to pick and choose which species are “predicted” on site. Removing species that require large amounts of credits will reduce the ability of the offset to compensate for the potential loss of the species (and reduce the offset area calculated with the existing methodology by about 5-10%). This may reduce credit requirements for developers, but will seriously undermine the ecological integrity of the tool.
- **Additionality with respect to riparian zones** - Additionality is addressed in BioBanking with respect to formal conservation agreements, however, the protection of riparian zones is not implicit in the design of an offset area. Under the *Native Vegetation Act*, clearing in riparian zones is not allowed on private property, and under the Water Management Act land adjacent to a river on public land should be protected where possible. The proposed changes to the BioBanking methodology encourage offset areas to be located in riparian zones by providing for a 5% “discount for species credits” on account of the offset being used to maintain natural flow regimes, and a 5% discount for biodiversity credits on account of the offset being used to maintain natural flow regimes (p43). There is the chance that offsets in riparian zones may also be eligible for further discount/s for erosion control and/or nutrient control. EDO NSW supports the protection of riparian zones under BioBanking, but does not agree that any discount is appropriate on account of riparian zones being protected under other legislation, and this essentially resulting in an offset area that is not additional.
- **Errors and over calculation of landscape value** - Landscape value is calculated as a function of: the percent cover of vegetation over 10 ha, 100 ha and 1000 ha radii from the offset site, the total adjacent remnant, and connectivity. The landscape value is then used to assess the appropriateness of an offset site to maintain or improve biodiversity lost at the development site. EDO NSW is concerned that the assessment of landscape value is not appropriate where the score is increased by including “connected” vegetation in the landscape that is not protected in perpetuity through an appropriate legal measure. In time, as vegetation in the landscape is incrementally cleared, the original offset site will lose its “value” and the overall aim of maintain or improve will not be met. In addition, EDO NSW does not agree that the

landscape value should increase where it includes newly planted vegetation for nature conservation (p41). Consistent with previous submissions, EDO NSW submits that newly planted vegetation does not adequately maintain or improve biodiversity loss due to the inherent time lag associated with critical habitat such as hollow bearing trees, or food trees.

- *Ambiguous use of scale for **connectivity** and percent vegetation in the landscape* - Connectivity is a component of landscape value and is a function of linkage width and condition. EDO NSW is concerned that there is no standard scale for the assessment of connectivity. We recognize that BioBanking will sometimes assess land sizes ranging from very small to very large, and that the adoption of a standard scale would be difficult, but this does not detract from the issue at hand, which is that assessors have the ability to influence the overall landscape value by choosing a landscape scale that either includes or excludes existing native vegetation.
- ***Area to edge ratio*** - The suitability of an offset area to provide habitat for the species' being offset is a function of the condition and suitability of the habitat. Edge to area ratio is a concept that is not fully addressed in BioBanking with respect to suitability, and the result is offset areas that are dissected with roads or power lines, or are edged by these or similar. EDO NSW recommends that the highest area to edge ratio possible be calculated (and that roads are not allowed), and that in areas where this is not most advantageous (for instance, where an offset forms part of a corridor or connectivity in the landscape), that the offset area has a prescribed "buffer" zone separate and additional to the actual offset.

4. The scheme framework including matters associated with biobanking agreements, statements and transactions, the Trust Fund and assessor accreditation

In relation to the current elements of the scheme framework, the EDO NSW makes the following observations and *recommendations*.

Biobanking agreements (Discussion Paper 3.1)

- Clear requirements for structure and content of biobanking agreements should remain in legislation.
- Biobanking agreements must apply in perpetuity and bind future owners without exception.
- Options to terminate or vary an agreement for the purpose of allowing a mining lease or critical infrastructure on a biobank site should be deleted.
- The fit and proper purpose test should only be removed if there is no weakening of monitoring, reporting and enforcement requirements.
- The collection of baseline data by accredited assessors is supported.
- Comprehensive auditing of biobank sites by OEH should be more regular than every 7 years. This is not onerous given the small number of sites.
- Annual reports for biobank sites must be publicly available and sufficiently detailed in terms of environmental outcomes.

Biobanking statements (Discussion paper 3.2)

- While we recognise that there are equity issues stemming from the different treatment of farmers and developers under different regimes, we submit that Biobank statements should not be made available for clearing under the NV Act as the BBAM has weaker environmental requirements than the EOAM. As discussed, this is not a reason to weaken the native vegetation regime, but rather develop a best practice standard.
- EDO NSW has serious concerns about the use of biobanking to fulfil requirements under the EPBC Act. The process of federally accrediting the Western Sydney Growth Centres biocertification illustrated that NSW offset schemes are weaker than the Commonwealth standard.⁵ EDO NSW has been involved in the development of a new Commonwealth offsets standard, that has been independently peer reviewed, and we submit that biobanking as proposed does not meet this standard. The EDO NSW has also been involved in responding to the broader proposed reforms to 'streamline' environmental laws, and has a number of serious concerns about state biodiversity laws adequately meeting a national standard.⁶

Assessment, review and approval process

- Identifying and protecting red flag areas is absolutely fundamental to the ecological integrity of the Biobanking scheme. There are some values that simply cannot be offset. Where a species or community is so rare that there are no credits available to purchase, this means it should not be offset. The EDO NSW strongly opposes any weakening of red flag provisions and any expansion of variation rules.

Credit transaction (Discussion Paper 3.4)

- The proposal to 'simplify credit profiles' is not supported, and was not supported by EDO NSW when proposed in late 2010. The Discussion Paper states that simplification is needed to "make the market more active and competitive and thereby increase participation in biobanking" (p20). Therefore, the proposal is essentially to relax strict rules that credits must match impacts for offsets. As repeatedly noted, the amendments to produce cost-savings and 'ease of use' are at the expense of environmental outcomes. If OEH no longer required credits to be matched for impacts and offsets then the scheme can have no credibility and cannot be supported. It would no longer be an offsetting scheme, it would be an environmental contributions scheme. As noted above, this is inconsistent with the TSC Act that requires a maintenance or improvement of biodiversity values.

Biobanking Trust Fund (Discussion paper 3.5)

- More detail is needed on how other programs might use the trust fund.

Accreditation of assessors (Discussion paper 3.6)

- EDO NSW would support a legislative scheme for accrediting assessors to undertake biobanking assessments and AOS/SIS.

⁵ EDO NSW submission on Biocertification of Western Sydney Growth Centres, available at: www.edonsw.org.au.

⁶ See COAG submission: *In Defence of Environmental Laws*. Available at www.edo.org.au.

Public information and engagement (Discussion paper 3.7)

- The EDO NSW found the Ministerial Reference Group for Biobanking (MRG) to be a useful forum for constructively discussing the development of the scheme. It provided a good opportunity to get a better understanding of the different perspectives of government and other stakeholders.
- We support the retention of the public register. However, we note that the EDO NSW was requested by a community group to file an information request (FOI) so that the community could see sufficient detail in relation to the Forrester's Beach statement.⁷

5. Ensure the scheme can respond to the outcomes of the NSW planning system review, and the EPBC Act review.

Planning system review

EDO NSW has been involved in the NSW planning review process and we have made a number of submissions and produced reports on best practice planning.⁸ The newly released Planning Green Paper (Department of Planning, July 2012) places emphasis on upfront strategic planning. We hope that this will assist in creating more certainty and agreement between the community and developers by identifying areas that are high conservation value and must not be developed. There is potential for the BBAM to be used for strategic assessments as well as individual project assessments under the new regime. We reiterate that it is therefore essential that the BBAM is a best practice ecologically robust tool, especially if it is to be applied more broadly. (The EDO NSW will be publishing detailed comment on the proposals of the Green Paper shortly).

In addition to the EP&A Act, there is a need to assess the interaction between biobanking and other NSW legislation. The following case study in relation to rural fires illustrates this. If a development qualifies under s100B of the Rural Fires Act 1997, a Bushfire Safety Authority (BSA) is required, which sets minimum Asset Protection Zones (APZs) depending on site variables such as slope, vegetation etc, and in accordance with Australian Standard 3959-2009. If a developer decides to use land adjacent to the development for the biobanking site (or if at a later date, a new developer develops land next to a previously declared biobanking site), issues with the protection of the biobanking site may occur if the APZs are not applied correctly. For example, extra clearing of the biobanking site may be required by law, or hazard management along the perimeter of the biobanking site may be required, which would increase the edge effect and decrease ecological value of the site. This will only occur in a few instances, such as a development and biobanking site being declared in the same development application, or if a new developer erroneously calculates the minimum APZ for a development, but the risk of losing biobanked land is still there, albeit small.

⁷ See Submission by the community in relation to the Biobanking statement issued for development at Forrester's Beach.

⁸ EDO NSW law reform submissions on NSW planning laws are available at: www.edonsw.org.au.

EPBC Act review

EDO NSW has made extensive comment on the review of the EPBC Act.⁹ An amending Bill was obviously not introduced in the Winter Session of federal Parliament as previously foreshadowed. In the absence of specific amendments we make comments relevant to the Government Response to the Hawke Review, and the more recent announcements of COAG.

Of direct relevance to biobanking, the Australian Government and state governments (via COAG) have indicated a preference for:

- ***Greater use of strategic assessment*** – The Western Sydney Growth Centres biocertification accreditation process demonstrated a disparity between Commonwealth and NSW offset standards. We submit that this disparity will be exacerbated if the proposed amendments are made to the BBAM. For example, the removal of species triggers (p38) may mean that EPBC Act standards are not fully met in relation to nationally listed species.
- ***Accreditation of state laws through bilateral agreements*** – COAG has set an extremely tight timeframe for agreements to be put in place which will effectively delegate Commonwealth assessment responsibilities to the states. As noted, the NSW planning laws are under review and until new laws are in place it will be impossible for the Commonwealth Government to know what they are accrediting. If a weakened biobanking scheme is part of the NSW planning environmental assessment process, there may be problems with finalising a bilateral agreement.
- ***Development of national standards*** – Part of the COAG reforms involve the development of national standards that states will need to meet. EDO NSW has met with and provided information to the federal bureaucrats who are working on this issue. As noted above, if the proposed changes are made to the BBAM, it will not meet national standards, and will require another round of amendments to bring it back up to meet a national standard. As stated at the outset of this submission, this review process provides an opportunity to establish a best practice ecologically robust standard for offsetting. If the scheme is to continue and achieve the objects of the TSC Act it cannot be weakened on the basis of cost-cutting for developers.

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⁹ EPBC Act submissions are available at: www.edonsw.org.au.