



THE LAW SOCIETY
OF NEW SOUTH WALES

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The Manager
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Office of Environment and Heritage
P.O. Box A290
SYDNEY NSW 1232

By email: biobanking@environment.nsw.gov.au

Dear Sir/Madam,

BioBanking Review: Discussion Paper

The Law Society appreciates the opportunity to comment on the *BioBanking review: Discussion paper* (Discussion Paper). The Discussion Paper has been reviewed by the Law Society's Environmental Planning and Development Committee (Committee).

The Committee has responsibility to consider and deal with any matters relating to, or associated with, environmental planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

The Discussion Paper aims to encourage feedback on the ways in which the New South Wales Biodiversity Banking and Offsets Scheme (BioBanking) could be improved. A *Revised BioBanking Assessment Methodology* is also provided which aims to demonstrate ways in which some of the issues raised in the Discussion Paper can be addressed.

Scope of the Review

The identified scope of the review encompasses:

- The extent to which the scheme is achieving its goal of maintaining or improving biodiversity conservation.
- The performance and cost effectiveness of BioBanking.
- The operation and use of the *BioBanking Assessment Methodology* and its relationship with similar methodologies.
- The scheme framework including matters associated with biobanking agreements, statements and transactions, the BioBanking Trust Fund and assessor accreditation.

The Committee comments on each of these matters in relation to the implementation of the scheme. The comments do not respond in detail to the individual questions in the Discussion Paper but highlight key issues and suggest improvements.

Achievement of biodiversity conservation goals

The Discussion Paper suggests that BioBanking offers advantages for biodiversity protection in that it is a science based methodology that provides legal security of the biobank site in perpetuity. Additionally it provides for ongoing funding for the care and enhancement of biodiversity on the biobank site and ensures that responsibility for maintaining the biobank site rests with landowners who are given annual payments raised from the sale of biodiversity credits to manage their land for conservation purposes.

Despite these advantages, BioBanking is not always chosen to assess and secure biodiversity offsets. One of the challenges identified in the Discussion Paper is the parallel operation of different systems for measuring biodiversity impacts and determining offsets. The Discussion Paper seeks feedback on the implications of maintaining different assessment and offsetting pathways that ultimately deliver different outcomes.

Within the metropolitan area the alternative to BioBanking is the Assessment of Significance/ Species Impact Statement (AOS/SIS) process. Where a proposed development is deemed likely to have an impact on a threatened species, population or ecological community, then the impact must be considered through the preparation of an Assessment of Significance (AOS). This Assessment determines whether the impact of the proposed development on biodiversity is likely to be a significant impact. If the development is deemed likely to have a significant impact the options include amending the proposal so that it would not result in a significant impact or the preparation of a Species Impact Statement (SIS) in accordance with legislative requirements.

The requirements for AOS are not as onerous as the assessment required under the BioBanking Assessment Methodology. The AOS/SIS process appears to be more commonly chosen over the BioBanking process as it is perceived to provide greater flexibility. However, where a SIS is required it would be expected that the cost involved would exceed that of a BioBanking assessment.

North Western Sydney is one of the fastest growing areas in the State and land development is placing a substantial burden on local biodiversity and Local Government's ability to determine applications with due diligence. Ecological assessments may be tailored to the developer's benefit and limited timeframe and resources are available to undertake detailed evaluation and assessment. For example, in areas that are designated as a release area for a residential development in the Hills Shire Council, the OEH has required the use of the BioBanking Methodology to determine cash offsets for the loss of vegetation. The Council has also used the methodology itself to determine the appropriateness of a biodiversity offset proposed by a proponent in the release area. In such situations, sensitive pockets of local biodiversity can be lost, and there is not a holistic approach taken as to where funds can be applied and whether the benefits outweigh or even match the loss of local biodiversity.

The Committee considers that there is a need for a common methodology for the assessment of offset requirements that is science based rather than an arbitrary application of land area or ratio offsets. The BioBanking scheme provides a better



framework for achievement of biodiversity goals as it provides the opportunity for a consistent, accountable methodology for the assessment of offset requirements.

The Committee recommends that the process of offsetting through BioBanking be simplified. The methodology could then be compulsorily triggered where an endangered or critically endangered ecological community is impacted, removing the potential for inconsistent biodiversity outcomes. For such a mechanism to work considerable improvements would be required to the process to facilitate ease of use and viability for landowners and developers.

Recommendations

The Committee supports, in principle, a BioBanking scheme (or similar common methodology for the assessment of offset requirements) as it provides a consistent and accountable framework for assessing biodiversity offsets and achieving biodiversity conservation goals.

The Committee recommends that:

- Consideration should be given to making the scheme compulsory where development impacts an endangered or critically endangered ecological community.
- Funds raised from developers using the alternative assessment methodology should only be used to rehabilitate and/or improve biodiversity found in the same local government area.

Performance and cost effectiveness

The Discussion Paper acknowledges that the uptake of BioBanking has been slow in its first few years of operation and identifies that the low participation rate is influenced by a number of factors including:

- Infancy of the scheme with participants deterred by the unknown.
- Use of alternative processes particularly the AOS and SIS process which is seen as providing smaller offset areas, easier tradeoffs and lower cost. Also under this process proponents are not required to protect 'red flag' areas (areas with high biodiversity conservation values).
- Cost of assessment for biobank sites which can exceed \$10,000 for consultant's fees. The ongoing costs for landowners can range from \$7,000 to \$366,000 per annum with the higher costs required for the intensive management phase. The costs for landowners are ultimately recovered through sale of credits generated on their land, however the upfront costs appear to prevent establishment of sites where there is no guaranteed buyer.
- Avoidance of BioBanking by some developers as they perceive there are no credits available for sale. For developers to obtain a biodiversity offset, application fees in excess of \$20,800 can be expected with the cost of offsetting ranging from \$2,500 to \$9,500 per credit.
- Lack of 'brokers' in the market to match buyers and sellers.

Despite these factors, the Discussion Paper suggests that engagement with the scheme is increasing, with a number of applications for biobanking agreements and statements moving through the approval process and others expected to be

submitted soon. It questions whether other factors have influenced participation and asks what could be done to increase developer and landowner participation.

The Committee agrees, in general terms, that the factors identified by the Discussion Paper influence participation in the scheme. However, the Committee considers cost, time and complexity are the factors that are most instrumental in inhibiting participation. While the newness of the scheme may be a factor it is not considered that this would be a major deterrent to developers and landowners if the scheme were easier to understand and use and cost effective to implement.

BioBanking has also not been effective as a market based scheme given that the potential demand for credits is not matched with a reasonable supply. Potential participants will not go through the methodology if there is not a strong likelihood that appropriate credits will be available to offset their development. The experience of some Local Government representatives involved in such agreements and statements suggests that the cost of offsetting may exceed the range indicated in the Discussion Paper with \$15,000 per credit a more realistic picture of costs. One suggestion to stimulate the market would be for Landcom to engage in the scheme. The Government has the opportunity to lead by example and demonstrate that BioBanking can provide a feasible means of achieving a balanced development outcome while offsetting biodiversity losses.

A BioBanking project by The Hills Shire Council provides insight into the issues involved with using the BioBanking Scheme. The timeframe to achieve biobanking agreement for the Council's three proposed sites took 18 months and was at considerably greater cost than the \$10,000 suggested in the Discussion Paper. While the cost of undertaking the Biobanking Assessment Methodology will vary considerably from site to site based on size, complexity of vegetation and other site-specific factors, based on the Council's experience, it would be expected that the cost of assessing ecosystems and credits in accordance with the methodology would generally range between \$20,000 - \$50,000 per site.

The Committee suggests that the key issues that influenced time and cost for this Council project included:

- Lack of commitment across all organisations, particularly between different sections of the OEH.
- Lack of a bi-lateral agreement between State and Federal Government departments. The proposed development required referral to the Department of Sustainability, Environment, Water, Population and Communities (DSEWP&C) under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1979* (EPBC). DSEWP&C sought an arbitrary ratio offset rather than the offsets assessed under the *Biobanking Assessment Methodology*.

The Committee considers that there are opportunities to reduce the time and cost associated with use of BioBanking by removal of duplication of assessments by different levels of government. The EPBC requirements and BioBanking assessment requirements need to be integrated so that the approval process is more streamlined to improve the uptake of the scheme. It is noted that this has commenced through the Council of Australian Governments (COAG) review process with State Government working to secure endorsement of State environmental assessment processes to remove the need for an ongoing Commonwealth role in detailed assessments. This reform is described in the recent Department of Planning Infrastructure Circular PS12-003 relating to initiatives to improve housing supply. A



whole of organisation focus at State level would also facilitate time and cost savings and improve viability for developers and landowners alike.

As previously stated, the complexity of the methodology is another deterrent to use.

Recommendations

The Committee recommends that:

- Landcom should be encouraged to engage in BioBanking to demonstrate how it can provide a feasible means of achieving a balanced development outcome while offsetting biodiversity losses.
- EPBC requirements and BioBanking assessment requirements should be integrated in order to streamline the process and facilitate uptake of the scheme.
- Work commenced through COAG to review ongoing detailed environmental assessment at Federal level should continue as it will remove duplication and achieve time and cost savings for the development industry.
- The review of the scheme needs to ensure that there is whole of organisation understanding and support within the OEH as to the outcomes sought and the means by which these are achieved.
- A renewed education and promotion campaign should be undertaken to highlight the economic benefits that can accrue through the scheme to encourage supply and stimulate the market.

Use of the BioBanking Assessment Methodology

In determining biodiversity impacts the *BioBanking Assessment Methodology* assesses State and national priorities, regional value, landscape value, site value, threatened species and proposed management actions. The Discussion Paper describes where concerns have been raised in relation to each of these attributes and how a revised methodology proposes to address concerns. The revised *BioBanking Assessment Methodology* has been publicly exhibited with the Discussion Paper and feedback is sought from BioBanking practitioners.

Some of the matters that the revised methodology seeks to address include:

- Clarifying 'red flag areas' i.e. areas that generally cannot be developed.
- Weighting of contributions of biodiversity to the broader ecological functioning of the landscape.
- Guiding assessment of connectivity with surrounding vegetation.
- Assessing site value on the basis of broader habitat value rather than on the needs of a single species.
- Simplifying the way in which ecosystem credit species is assessed.
- Making better use of more appropriate local data.
- Considering the extent to which expert reports should be allowed to be used.
- Allowing for minor variations where credit purchase is constrained and an equal or greater environmental outcome can be achieved.
- Reviewing the quality of data in the vegetation type database and vegetation benchmark database.



- Providing more flexible offset options for retiring credits in some circumstances.

The *BioBanking Assessment Methodology* provides a scientific basis for assessing offset requirements and while complex, this complexity is necessary to ensure that there can be confidence in the accuracy of results. However any measures to improve the ease of use of the methodology are strongly supported. The Committee considers that the proposed measures do not go far enough in terms of making the methodology more accessible to landowners and developers. It is recommended that a Plain English version of the methodology should be made available that minimises the use of jargon and sets out the process in a simpler manner.

The offset rules require that the suite of threatened species present at a development site be matched by vegetation types that provide habitat for the same suite of species, that are of the same formation and are equally or more highly cleared in the catchment management authority area. This is referred to as the 'like for like' rule and can make it extremely difficult to find matching credits. Relaxation of this rule is supported where this can be done without compromising the protection of threatened entities. To improve flexibility, consideration could also be given to expanding the scheme to include non-listed entities.

The OEH is considering provisions that would provide more flexible offset options for retiring credits in some circumstances. This aspect of the review is considered critical if there is to be any increase in the use and success of the BioBanking Scheme.

Recommendations

To summarise, the Committee recommends:

- The *BioBanking Assessment Methodology* should be available in a simpler Plain English format that makes it accessible and more readily understood by those who are intended to make use of it i.e. developers and landowners.
- Changes to the methodology to relax 'like for like' requirements and make credit profiles easier to match are strongly supported in order to give greater flexibility to trading credits. When determining the extent of flexibility to be provided a holistic view of the biodiversity outcomes is needed.
- Consideration should be given to expanding the BioBanking scheme to include non-listed entities.

The Scheme framework – Agreements, Statements, Transactions

The Discussion Paper seeks feedback on ways in which the framework can be changed to improve the operation and use of the scheme.

The scheme framework is one of the main areas where improvements can be made. The Methodology necessitates a level of complexity to accommodate many different factors that ensure confidence in results. However the scheme framework, including the approval process and mechanism for trading credits, could be improved to facilitate understanding and use. General comments related to the approval process for biobanking agreements and statements have been canvassed earlier.

The Discussion Paper questions the perception of 'red flag areas'. Red flag areas are areas of land with high biodiversity conservation values where impacts of development cannot be offset unless the Director General determines that avoidance of the red flag area is unnecessary in the circumstances. It is considered that potential red flag areas may serve to deter potential proponents from using BioBanking as they may see this as not facilitating their developments.

In addition to improving the approval process, an easier to use interface needs to be developed for credit trading and/or brokerage. The system is cumbersome and somewhat confusing making it difficult to determine particulars of credits available. The credit profile is likely to constrain trading as it makes it more difficult to find credits for offsetting. The credit profile is a description of the credit required in a vegetation zone according to the attributes of Central Mapping Authority subregion, vegetation type, vegetation formation, surrounding vegetation cover and patch size. Careful consideration could be given to relaxing this requirement but not at the expense of placing threatened entities at risk. Explaining how the credit profile system works in simple terms would also be helpful.

The Committee supports incorporating a field component in the training and accreditation of assessors to ensure greater consistency in assessments. More direct input from OEH staff in training would also be valuable. The Discussion Paper questions what skills are most important for accredited assessors. High level flora survey skills are important as is skill in using geographical information systems (GIS) and experience in assessing habitat structure and complexity.

In terms of public information and engagement OEH could assist Councils in promoting the benefits of BioBanking areas of significant vegetation to local residents. The general population has little knowledge of BioBanking and greater education and publicity would help to create greater public awareness. It is suggested that OEH could dedicate a team to directly approach targeted landholders to encourage and promote BioBanking in the general community.

Recommendations

The Committee recommends:

- The use of 'red flag areas' should be minimised so as to not deter potential participants from using the scheme.
- Development of a simplified credit trading/brokerage interface is needed that can be easily interrogated to determine credits available.
- Consideration should be given to relaxing the credit profile requirement (but not at the expense of placing threatened entities at risk) and providing a simple plain English explanation as to how the system works.
- The value of training provided for BioBanking Assessors could be improved by more direct input from OEH staff and a field component and to ensure greater consistency in assessments. Skills important for accredited BioBanking Assessors include high level flora survey skills, GIS skills and experience in assessing habitat structure and complexity.

It is suggested that OEH dedicate a team to directly approach targeted landholders to encourage and promote BioBanking in the general community.



Conclusion

In reviewing the scheme, a key concern is the achievement of a viable mechanism that can be consistently used to address biodiversity impacts in a way that does not sterilise opportunities where land has been identified for residential and employment development. There are a number of factors limiting participation in and use of the scheme, particularly the time, cost and complexity of the process. Despite these factors it is the only scientifically based method available for assessing biodiversity values and the impacts of development on biodiversity values. The scheme should be supported but significant improvements will need to be made in the way in which it is implemented and promoted.

There is a need for a simpler, more flexible framework with a compulsory methodology triggered once an impact on an endangered or critically endangered ecological community has been identified. State Government needs to take a lead role in simplifying and promoting the scheme to reduce duplication of requirements and facilitate uptake and ease of use.

If you have any queries about this submission, please contact Liza Booth, Policy Lawyer, Environmental Planning and Development Committee by telephone on (02) 9926 0212 or by email to liza.booth@lawsociety.com.au

Yours faithfully,



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President