



New South Wales  
Aboriginal Land Council

# What you need to know about biobanking.

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Compensating  
for the loss of  
biodiversity  
resulting from  
development.  
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## What is biobanking?

The NSW Government set up the Biodiversity Banking and Offsets Scheme (Biobanking) as a way of compensating for the loss of biodiversity resulting from development by providing offsets to help conserve biological diversity.

The scheme was established by the Biobanking Amendments to the *Threatened Species Conservation Act 1995* (TSC Act), which commenced in July 2008.

The four key elements of the Amendments are: establishing biobanking sites on land, creating biodiversity credits, trading of credits (once they are created and registered) and enabling credits to offset the impact of development on biodiversity.

## How are biobanking sites established?

Biobanking sites are established through biobanking agreements between the Minister for Climate Change and the Environment (the Minister) and the landowners.

However, the landowner must meet certain criteria, including having native vegetation and/or threatened species on their property.

They are established after a landowner obtains ecological, economic and legal advice about a potential biobank site on their land.

## What is the purpose of biobanking?

The purpose of biobanking is to help conserve biodiversity through a system of credits and offsets.

The Department of Environment and Climate Change (DECC) believes this is important because of the threat posed to animals, plants and ecosystems in Australia by development (for housing, mining and other purposes).

This is because development contributes to environmental degradation and habitat loss, and poses a serious threat to biodiversity. Using the Biobanking Scheme, developers can 'offset' the damage caused to biodiversity by their projects through supporting conservation in the form of a biobank.

## What is Land Alive?

Land Alive provides opportunities for Aboriginal landowners to participate in the Biobanking Scheme.

In addition to biobanking, there are opportunities for land management training, as well as mapping the land's natural values and biodiversity.

The program also aims to work closely with Aboriginal community members to ensure cultural land management knowledge is valued by mainstream land managers.

## How long does a biobanking agreement last?

A biobanking agreement will result in the conservation of the site in perpetuity. This means that the agreement lasts forever, and so no development that impacts on biodiversity can ever occur on the biobank site.

## What is required of participants?

Landowners participating in the Biobanking Scheme agree to conserve the natural values of the biobank site on their land in perpetuity.

To do so they must undertake particular land management activities throughout the year, as detailed in the agreement.

They may also be required to abstain from activities on areas that adjoin the biobank site where such activities place the biodiversity values at risk.

Landowners must also comply with the requirements for reporting, and document their management of the site.

Failure to meet these and any other commitments can have serious ramifications if warnings and meetings cannot solve any compliance issues in the long term.

A major breach of compliance could lead to the case being heard in the Land and Environment Court and could potentially result in loss of land.



For example, the LALC may choose to set up a biobank rather than develop the land for residential purposes.

## How is the price of a credit determined?

The price of biodiversity credits is determined in accordance with Part A and Part B costs. Part A is the 'Total Fund Deposit' and covers the estimated cost of management and reporting of the biobank site over the life of the agreement.

The amount for Part A is determined by the landowner for their unique site. They have the option to receive input from other land management experts and the amount will have final sign off by DECC.

Part B is known as the 'return to landholder', and is made up of the costs that a biobank site owner may seek to charge when setting the price of their credits. These may include costs associated with establishing the biobank site, site assessment, preparation of management plans, land value, the opportunity cost and the return or risk margin.

Part B is determined by the biobank site owner, while considering the buyer of the credits. Some of these costs may be difficult to determine, for this reason it is important that Local Aboriginal Land Councils (LALCs) have legal and land valuation advice before signing any agreements. Any LALC will also need to obtain approval under the Aboriginal Land Rights Act from NSWALC.

## What is the opportunity cost?

The opportunity cost is the value of an alternative use of land forgone because of the decision to set up a biobank.

For example, the LALC may choose to set up a biobank rather than develop the land for residential purposes.

The opportunity cost takes into account the market value of the land, stamp duty and the profit/risk margin, and is considered when determining the Part B component of the credit price.



## How are payments made to landowners?

At first, all the money from the sale of the credits goes towards the Total Fund Deposit, which is set aside in a trust fund. The funds from the trust will be invested in the stock market, with a return on the investment paid each year.

However, once the amount of the Total Fund Deposit is reached, any further money from the sale of credits is profit for the landowner, which is paid upfront.

## How long does the income stream last?

DECC advises that the income from the biobanking fund (Part A) will last forever.

This is because the funds from the trust will be invested in the stock market, with a return on the investment paid each year.

## What if the trust fund account runs out?

DECC considers the risk that the funds could run out to be very low. However, if the investment returns fall significantly, then management actions with higher costs, such as fire management and replanting will not be required. However, low cost management actions will still be required.

### **How do landowners submit an expression of interest?**

DECC recommends submitting an expression of interest early in the process using the biobanking website.

The form asks for details about the location, vegetation and threatened species present on the site. The expression of interest will be placed on a public register.

### **What obligations does an expression of interest in biobanking entail?**

Submitting an expression of interest does not carry any obligations.

### **What is the DECC assessment methodology?**

This is a way of determining the biodiversity value of the site, in order to determine the suitability of the site for biobanking and the number and type of credits.

### **Can landowners conduct a biobanking site assessment?**

No, only an assessment by an accredited assessor will be considered in the application process.

However, landowners with a good knowledge of their land can use the biobanking credit calculator software program to make estimations.

Users record information about the natural values of the land into the program, such as vegetation and any threatened species.

The credit calculator can assist in estimating the number and type of biodiversity credits that a biobank could potentially generate. However, it does not indicate the price of the credits.'

### **How can landowners access the credit calculator software?**

The program will be available to access online on the biobanking website from April 2009.

### **How often will the site Management Plan be reviewed?**

According to DECC, this will depend on the nature of the biobank site and the management actions required.

How often the landowner would like these to be reviewed will also be considered, and the landowner can request to have their management actions reviewed at any time, particularly if the land is affected by incidents such as a bushfire.

### **Will there be an opportunity for landowners to participate in the review?**

Yes.

### **What happens if the biobank is affected by a natural disaster such as a bushfire?**

If the site is affected by fire or other phenomena, the obligation for the landowner is to continue to implement the land management actions as outlined in the agreement.

However, the impact of a natural disaster may be such that these actions will need to be changed to reflect the reality of the situation and any change in priorities.

This will involve working with DECC, which will consider possible changes on a case-by-case basis.

### **Does the biobank need to be insured?**

Yes. The estimated cost of insurance for the site will be included in the Part A Total Fund Deposit.

Insurance is especially important in case the site is affected by bushfires or other natural disasters.

For example, if building a fence was among the agreed land management actions, and the fence were destroyed, repairs could be funded by insurance payments.

### **Can an agreement be changed or terminated after it has been signed?**

Yes, but only in certain circumstances and with the approval of the Minister, to be further identified in the Landowner's Guide which will be published by DECC.

### **What happens if landowners would like to change the biobanking agreement?**

Landowners must submit a biobanking agreement variation application to the Minister to request the Minister's consent.

This application will involve further documentation.

### **If landowners sign a biobanking agreement, do they still retain ownership of the land?**

Yes.

### **What is the DECC Compliance Assurance Strategy, and what does this mean for landowners?**

The Compliance Assurance Strategy explains how the biobanking scheme will be implemented lawfully, equitably and transparently so that biodiversity values are conserved.

It aims to audit landowners' compliance with the management actions in the agreement. Failure to comply may lead to enforcement action, including legal action.

### **What penalties may apply for a breach of the biobanking agreement?**

Any breach of the biobanking agreement could lead to severe consequences, including court proceedings and payment of costs.

The Minister may instruct the landowner to carry out work that is necessary to rectify a breach. If this is not complied within a certain period, the Minister may enter the land to carry out these works and then take legal action in order to recover costs.

However, if there is a breach that places biodiversity values of the biobank site at serious risk, the Threatened Species Conservation Act provides that the Minister can apply to the Land and Environment Court for an order to resume title to the land.

This is an order to protect the biobanking agreement (and therefore to protect the biodiversity that is credited), and is an option of last resort.

### **Could biobanking affect land rights?**

Yes, although LALCs will retain ownership of the land they are legally bound to conserve the site as a biobank forever. This means that the landowners are unable to determine future use of the land, and restrictions on land use will apply. Biobanking also affects land rights because a breach of the agreement may jeopardise ownership of the land.

### **What are the implications for cultural activities?**

It is possible that the conditions of biobanking agreements could limit activities such as hunting and gathering or fishing on biobanking sites.

The regulations do not explicitly prohibit such activities, but that there may be restrictions placed on specific agreements.

Therefore, it is important for LALCs to obtain legal advice in relation to any proposed agreement and how it may affect the conduct of such activities.

Permission to conduct such activities may need to be incorporated into the agreement.

**Biobanking also affects land rights because a breach of the agreement may jeopardise ownership of the land.**

## How does the Aboriginal Land Rights Act (ALRA) relate to the Biobanking Scheme?

Local Aboriginal Land Councils are required to improve, protect and foster the best interests of all Aboriginal people in the area.

Depending on the facts of the case, biobanking may not be the best use of land for the community.

Therefore, a LALC must carefully consider whether biobanking is the best option to obtain income from the site.

## Does NSWALC have to approve biobanking agreements?

Yes. Since biobanking is a 'use' of land, a LALC must obtain approval from NSWALC.

Any LALC considering entering into a biobanking agreement should contact NSWALC Commercial Unit for assistance in relationship to applying for NSWALC approval.

## What are the biobanking tax implications for LALCs?

The tax implications of biobanking have not yet been finalised.

## What is the nature of the 'fit and proper person criteria'?

Both parties to biobanking agreements are subject to fit and proper person. For LALCs, the relevant person would be the body corporate, however the Board members of the LALC may also be scrutinised.

The Minister is required to consider the criteria in making a decision, and may consider a range of factors.

These include whether the person has contravened any relevant legislation, the competence of the person undertaking the land management activities and the financial capacity to comply with the agreement.

However, the criterion also takes into account issues of bankruptcy and insolvency, including whether the LALC may have had an administrator appointed during the previous three years.



## What are the privacy issues associated with the 'fit and proper person criteria'?

Authorised officers are able to obtain information and records to investigate whether the LALC satisfies a fit and proper person test. There are various privacy issues associated with some of the inquiries to be made.

## What is the New South Wales Aboriginal Land Council's (NSWALC) Position on biobanking?

NSWALC is conducting research and analysis on the biobanking scheme in order to assist Local Aboriginal Land Councils make informed decisions. The research includes independent legal review and robust economic modelling to identify legislative and economic concerns.

Key findings will be considered and a NSWALC Position will then be communicated to the Land Council Network.

For more information about the Biobanking Scheme and Land Alive please contact:

Susan Becchio  
Land Policy and Research Unit  
NSWALC  
(02) 9689 4444

**Email:** [susan.becchio@alc.org.au](mailto:susan.becchio@alc.org.au)