

# Threatened Species Conservation (Biodiversity Banking) Regulation 2008

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New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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# Threatened Species Conservation (Biodiversity Banking) Regulation 2008



New South Wales

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Threatened Species Conservation Act 1995*.

VERITY FIRTH, M.P., Minister for Climate Change and the Environment

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008*.

### 2 Definitions

(1) In this Regulation:

**approved form** means a form approved by the Director-General.

**biobank site account** has the meaning given by clause 30.

**fee unit** has the meaning given by clause 51.

**financial year** means the period from 1 July in any year to 30 June in the following year.

**Fund** means the Biobanking Trust Fund.

**impact assessment** means an assessment referred to in section 127ZK (3) (c) of the Act.

**management payment**, in respect of a biobank site, has the meaning given by clause 29.

**methodology** means the biobanking assessment methodology.

**personal information** has the same meaning as it has in the *Privacy and Personal*

*Information Protection Act 1998.*

**public authority** means a public or local authority constituted by or under a law of New South Wales or the Commonwealth, and includes the following:

- (a) a New South Wales or Commonwealth Government department,
- (b) a NSW Government agency, a State owned corporation or a local council,
- (c) a body corporate in which New South Wales or the Commonwealth has a controlling interest.

**register** means:

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

**scheduled management payment**, in respect of a biobank site, has the meaning given by clause 29.

**the Act** means the *Threatened Species Conservation Act 1995*.

**total Fund deposit** for a biobank site has the meaning given by clause 26.

- (2) Expressions used in this Regulation have the same meaning as they do in Part 7A of the Act, unless the contrary intention appears.
- (3) Notes included in this Regulation do not form part of this Regulation.

## **Part 2 Biobanking assessment methodology**

### **3 Special requirements in relation to land with high biodiversity conservation values**

- (1) The methodology must provide for a method of identifying areas of land that have high biodiversity conservation values.
- (2) An area of land may be identified as having high biodiversity conservation values because of:
  - (a) the type of vegetation in the area, the extent to which it is cleared or the condition of the vegetation (or any combination of these factors), or
  - (b) the type of species, populations or ecological communities found in the area.
- (3) In addition, the methodology must make provision for the identification of those areas of land that have high biodiversity conservation values because of the presence on the land of any highly cleared vegetation type for the catchment area in which the

land is located, which is not in low condition.

- (4) The methodology must include provision to the effect that development is not to be regarded as improving or maintaining biodiversity values if the development site comprises or includes an area of land identified by the methodology as having high biodiversity conservation values, or any part of such an area, and the development has an adverse impact on those biodiversity conservation values, unless the Director-General makes a determination, in the particular case, to the effect that:
  - (a) the contribution of the impacted biodiversity conservation values on the development site to regional biodiversity values is low, and
  - (b) the impacted biodiversity conservation values are not viable, or their viability is low, and
  - (c) the Director-General is satisfied that all reasonable measures to avoid the adverse impact on biodiversity conservation values, or improve the viability of the biodiversity conservation values, have been considered.
- (5) If the area of land identified as having high biodiversity conservation values is so identified because of the presence of a highly cleared vegetation type for the catchment area, which is not in low condition, the methodology must provide that the Director-General must not make a determination referred to in subclause (4) unless the area of land so identified as having high biodiversity conservation values is less than 4 hectares in size.
- (6) For the purposes of this clause, a vegetation type is a **highly cleared vegetation type** for a catchment area if its distribution in the catchment area is equal to or less than 10% of its estimated distribution in the catchment area before the year 1750.
- (7) In this clause:

**catchment area** means the area of operations of a catchment management authority established under the [Catchment Management Authorities Act 2003](#).

#### 4 Creation of biodiversity credits in respect of land with existing conservation obligations

- (1) The methodology must provide that biodiversity credits may be created in respect of management actions carried out or proposed to be carried out in respect of a biobank site only if the management actions are additional to any biodiversity conservation measures, or other actions, that are already being carried out on the land, or are required to be carried out, under:
  - (a) a restriction on use or public positive covenant under Part 4A of the [Crown Lands Act 1989](#), or
  - (b) a conservation agreement entered into under the [National Parks and Wildlife Act 1974](#), or

- (c) a trust agreement entered into under the *Nature Conservation Trust Act 2001*, or
  - (d) any agreement entered into with a public authority under which the owner of the land receives funding for biodiversity conservation purposes (other than a biobanking agreement), or
  - (e) in the case of publicly owned land, any Act.
- (2) Subclause (1) does not apply to the following:
- (a) a restriction on use or public positive covenant under Part 4A of the *Crown Lands Act 1989* that is imposed in connection with an application to purchase land that is duly made by a lease holder in respect of that land before 1 January 2009,
  - (b) a conservation agreement entered into under the *National Parks and Wildlife Act 1974* as a result of a proposal made by the landholder to the Minister administering that Act before 1 January 2009,
  - (c) a trust agreement entered into under the *Nature Conservation Trust Act 2001* as a result of a proposal made by the landholder to the Nature Conservation Trust of New South Wales before 1 January 2009.

(3) In this clause:

**publicly owned land** means land owned by, or under the control of, the State, the Commonwealth or a public authority, other than land that is the subject of a perpetual lease or land that the Minister is satisfied is being managed by a person or body (other than the State, the Commonwealth or a public authority) under a long term lease, licence or other arrangement.

**Note—**

See also clause 11, which prevents certain land from being designated as a biobank site. This includes land that is subject to other existing biodiversity conservation arrangements.

## **5 Review of methodology**

- (1) The Minister is to cause a review of the methodology to be carried out:
- (a) as soon as possible after the period of 2 years after the methodology is first published in the Gazette, and
  - (b) at least every 5 years thereafter.
- (2) The Minister is required to give the public an opportunity to make submissions in relation to any such review.

## **6 Minister may change methodology following review**

- (1) The Minister is authorised to make an order that amends, repeals or replaces the



methodology if:

- (a) a review of the methodology has been carried out and the public has been given an opportunity to make submissions in relation to the review in accordance with this Part, and
  - (b) the Minister has considered the Director-General's report in relation to the submissions prepared in accordance with this Part, and
  - (c) the Minister certifies in writing that the amendment, repeal or replacement of the methodology is made as a consequence of the review.
- (2) The Minister is authorised to make any such order whether or not the Minister decides to implement all or any of the recommendations contained in the Director-General's report.

#### **7 Minister may change methodology following public consultation**

- (1) The Minister is also authorised to make an order that amends, repeals or replaces the methodology (otherwise than as a consequence of a review of the methodology) if:
- (a) the public has been given an opportunity to make submissions in relation to the proposed amendment, repeal or replacement in accordance with this Part, and
  - (b) the Minister has considered the Director-General's report in relation to the submissions.
- (2) The Minister is authorised to make any such order whether or not the Minister decides to implement all or any of the recommendations contained in the Director-General's report.

#### **8 Public consultation requirements**

- (1) This clause sets out the requirements that must be complied with in order to give the public an opportunity to make submissions on:
- (a) any review of the methodology, or
  - (b) a proposal to amend, repeal or replace the methodology (otherwise than as a consequence of a review).
- (2) In order to give the public an opportunity to make submissions about any such matter, the Director-General is to cause notice of the matter to be published in a newspaper circulating generally throughout the State and on the website of the Department.
- (3) The notice is to:
- (a) invite the public to make written submissions to the Director-General on the

matter during the period indicated in the notice (***the consultation period***), being a period ending no earlier than 30 days after the date the notice is first published, and

- (b) indicate that copies of the methodology are available at the head office of the Department and on the website of the Department.
- (4) During the consultation period, the Director-General is to cause copies of the methodology, and any other explanatory material or information the Director-General considers appropriate, to be exhibited at the head office of the Department and on the website of the Department.
- (5) At the end of the consultation period, the Director-General is to provide a report to the Minister that:
  - (a) summarises the main issues raised in any submissions received during the consultation period, and
  - (b) makes such recommendations as the Director-General considers appropriate in relation to those submissions.

#### **9 Minor changes to methodology not requiring public consultation**

- (1) The Minister is authorised to make an order that amends the methodology at any time if:
  - (a) the Minister is of the opinion that the amendment is of a minor nature, and
  - (b) the Minister certifies in writing that the amendment is of a minor nature.
- (2) Without limiting subclause (1), amendments of a minor nature include amendments that:
  - (a) correct any minor error or omission in the methodology, such as a spelling or grammatical error, a redundant or obsolete reference, obviously missing words, or wrong cross-references, or
  - (b) make any other change necessary to address matters that are of a consequential, transitional, machinery or other minor nature.
- (3) The requirements set out in clause 8 do not apply to amendments authorised under this clause.

#### **10 Changes to methodology—general**

The Minister is authorised to make an order that amends, replaces or repeals the methodology only in the circumstances provided for by this Part.

## Part 3 Biobanking agreements

### 11 Land excluded from being designated as biobank site

- (1) Land is not to be designated as a biobank site by a biobanking agreement if:
  - (a) the Minister is of the opinion that any previous, current or proposed use of the land proposed to be designated as a biobank site is inconsistent with biodiversity conservation or will prevent management actions from being carried out on the land or prevent the purpose of those actions from being achieved, or
  - (b) the Minister is of the opinion that any previous, current or proposed use of any land that is adjacent to or in the vicinity of the land proposed to be designated as a biobank site will prevent management actions from being carried out on the land proposed to be designated as a biobank site or prevent the purpose of those actions from being achieved, or
  - (c) the land is the subject of an offset (within the meaning of the *Native Vegetation Regulation 2005*) under a property vegetation plan approved under the *Native Vegetation Act 2003*, or
  - (d) the Minister is of the opinion that the land is already the subject of a requirement to carry out biodiversity conservation measures of an ongoing nature on the land under a condition of an approval or consent granted under Part 3A, 4 or 5 of the *Environmental Planning and Assessment Act 1979* (this extends to any land that is the subject of a conservation agreement entered into under the *National Parks and Wildlife Act 1974* for the purpose of compliance with such a condition), or
  - (e) the Minister is of the opinion that biodiversity conservation measures are already being carried out, or are required to be carried out, on the land under an offset arrangement made for the purpose of complying with requirements imposed by or under any Act (including the requirements of any authority granted by a public authority under any Act), or
  - (f) the land is reserved under Part 4 or Part 4A of the *National Parks and Wildlife Act 1974*, or
  - (g) the land is a flora reserve or special management zone within the meaning of the *Forestry Act 1916*.
- (2) Subclause (1) does not prevent other parts of a parcel of land (that do not fall within subclause (1) (a)–(g)) from being designated as a biobank site by a biobanking agreement.
- (3) This clause has effect in relation to land at the time that any biobanking agreement in relation to that land is first entered into or proposed to be entered into. Accordingly, the fact that land designated as a biobank site by a biobanking agreement becomes,

after the biobanking agreement is entered into, land excluded from being designated as a biobank site under this clause does not affect the validity of the biobanking agreement (or any subsequent variation of the agreement).

## **12 Assessment of biobank site**

- (1) Land is not to be designated as a biobank site by a biobanking agreement unless an assessment has been made of the proposed biobank site.
- (2) The assessment must be carried out by a person accredited to carry out the assessment under section 142B of the Act.
- (3) The assessment is to determine the number and class of biodiversity credits that may be created, in accordance with the methodology, in respect of the management actions proposed to be carried out on the land under the terms of the proposed biobanking agreement.
- (4) If the assessment is carried out by an officer or officers of the Department, the Director-General may charge a fee in respect of the carrying out of the assessment.
- (5) The amount of the fee, or the manner in which it is to be calculated, is to be determined by the Director-General.

## **13 Preparation of management plans**

- (1) The Director-General may require one or more management plans to be prepared in respect of a proposed biobank site, such as management plans relating to the control of weeds or fire management.
- (2) If such a management plan is prepared by an officer or officers of the Department, the Director-General may charge a fee in respect of the preparation of the management plan.
- (3) The amount of the fee, or the manner in which it is to be calculated, is to be determined by the Director-General.

## **14 Application to enter into biobanking agreement**

- (1) A request to the Minister to enter into a biobanking agreement is to be made by application of the owner of the site proposed to be designated as a biobank site in accordance with this clause.
- (2) An application:
  - (a) is to be made to the Minister in an approved form, and
  - (b) is to include or be accompanied by any information or document specified in the approved form, and

- (c) is to be accompanied by a processing fee of 6 fee units, comprised of:
  - (i) a non-refundable component of 1 fee unit, and
  - (ii) a refundable component of 5 fee units.

**Note—**

An assessment fee and a fee for the preparation of management plans may also be payable in respect of the application.

- (3) The Minister may waive or refund the whole or any part of the refundable component of the processing fee payable in connection with an application.
- (4) The processing fee payable in connection with an application is additional to any fee payable to the Director-General in respect of an assessment of a proposed biobank site or the preparation of a management plan in respect of a proposed biobank site.

**15 Fit and proper person criteria**

- (1) The Minister must, before entering into a biobanking agreement with a person, consider whether the person (whether or not an individual) is a fit and proper person to enter into, and fulfil the obligations imposed by, the agreement.
- (2) The Minister may consider any or all of the following matters in determining whether the person is such a fit and proper person:
  - (a) that the person has contravened any relevant legislation, or has held a licence or other authority that has been suspended or revoked under any relevant legislation,
  - (b) that, if the person is a body corporate, a director of the body corporate:
    - (i) has contravened any relevant legislation, or has held a licence or other authority that has been suspended or revoked under any relevant legislation, or
    - (ii) is or has been the director of another body corporate that has contravened any relevant legislation, or has held a licence or other authority that has been suspended or revoked under any relevant legislation,
  - (c) the person's record of compliance with relevant legislation,
  - (d) if the person is a body corporate, the record of compliance with relevant legislation of any director or other person concerned in the management of the body corporate,
  - (e) whether, in the opinion of the Minister, the management actions that are to be carried out under the biobanking agreement will be in the hands of a person competent to undertake them,

- (f) whether, in the opinion of the Minister, the person is of good repute, having regard to character, honesty and integrity,
  - (g) if the person is a body corporate, whether, in the opinion of the Minister, a director or other person concerned in the management of the body corporate is of good repute, having regard to character, honesty and integrity,
  - (h) whether the person, in the previous 10 years, has been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,
  - (i) if the person is a body corporate, whether a director or other person concerned in the management of the body corporate has, in the previous 10 years, been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,
  - (j) whether the person, during the previous 3 years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit,
  - (k) if the person is an individual, whether he or she is or was a director or person concerned in the management of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous 3 years,
  - (l) if the person is a body corporate, whether the body corporate is the subject of a winding up order or has had a controller or administrator appointed during the previous 3 years,
  - (m) whether the person has demonstrated to the Minister the financial capacity to comply with the person's obligations under the proposed biobanking agreement,
  - (n) whether the person is in partnership, in connection with carrying out management actions on a proposed biobank site, with a person whom the Minister does not consider to be a fit and proper person under this clause.
- (3) Without limiting the generality of the above, the Minister may disregard contraventions referred to in subclause (2) having regard to the seriousness of the contraventions, the length of time since they occurred, and other matters that appear relevant to the Minister.
- (4) In this clause:
- relevant legislation** means the following Acts, or parts of Acts, and any regulations, agreements, authorities or other instruments entered into, granted or made under those Acts or parts (whether or not still in force):

- (a) the Act,
- (b) the *Contaminated Land Management Act 1997*,
- (c) the *Environmental Planning and Assessment Act 1979*,
- (d) the *Environmental Trust Act 1998*,
- (e) the *Environmentally Hazardous Chemicals Act 1985*,
- (f) Parts 7 and 7A of the *Fisheries Management Act 1994*,
- (g) the *Marine Parks Act 1997*,
- (h) the *National Parks and Wildlife Act 1974*,
- (i) the *Native Vegetation Act 2003*,
- (j) the *Ozone Protection Act 1989*,
- (k) the *Pesticides Act 1999*,
- (l) the *Protection of the Environment Administration Act 1991*,
- (m) the *Protection of the Environment Operations Act 1997*,
- (n) the *Radiation Control Act 1990*,
- (o) the *Recreation Vehicles Act 1983*,
- (p) the *Road and Rail Transport (Dangerous Goods) Act 1997*,
- (q) the *Waste Avoidance and Resource Recovery Act 2001*,
- (r) the *Wilderness Act 1987*,
- (s) a repealed Act that corresponds to an above Act,
- (t) an Act of the Commonwealth, another State or a Territory that corresponds to an above Act.

## **16 Variation of biobanking agreement**

- (1) A request for the consent of the Minister to the variation of a biobanking agreement is to be made by application of the owner of the biobank site in accordance with this clause.
- (2) An application for the consent of the Minister to a variation of a biobanking agreement:
  - (a) is to be made to the Minister in an approved form, and

- (b) is to include or be accompanied by any information or document specified in the approved form, and
  - (c) is to be accompanied by a fee of 11 fee units, comprised of the following:
    - (i) a non-refundable component of 1 fee unit,
    - (ii) a refundable component of 10 fee units.
- (3) The Minister may refund the whole or any part of the refundable component of the fee paid in connection with the application (whether or not a biobanking agreement is varied as a consequence of the application).

**Note—**

Section 127H of the Act sets out various pre-conditions that must be satisfied before the Minister can agree to the variation of a biobanking agreement.

**17 Termination of biobanking agreement**

- (1) A request for the consent of the Minister to the termination of a biobanking agreement is to be made by application of the owner of the biobank site in accordance with this clause.
- (2) An application for the consent of the Minister to the termination of a biobanking agreement:
  - (a) is to be made to the Minister in an approved form, and
  - (b) is to include or be accompanied by any information or document specified in the approved form, and
  - (c) is to be accompanied by a fee of 7 fee units, comprised of the following:
    - (i) a non-refundable component of 1 fee unit,
    - (ii) a refundable component of 6 fee units.
- (3) The Minister may refund the whole or any part of the refundable component of the fee paid in connection with the application (whether or not the biobanking agreement is terminated as a consequence of the application).

**Note—**

Section 127G of the Act sets out various pre-conditions that must be satisfied before the Minister can consent to the termination of a biobanking agreement.

**18 Annual contribution by owners of biobank site**

- (1) The owner of a biobank site is required to pay to the Minister a contribution towards the costs referred to in section 127ZZ of the Act.



- (2) The contribution is payable annually, in accordance with the requirements of an invoice issued to the owner of the biobank site by the Director-General.
- (3) The amount of the annual contribution is 11 fee units.
- (4) The Minister is authorised to waive payment of a contribution or part of a contribution payable under this clause if:
  - (a) the owner of the biobank site has not sold any of the biodiversity credits created in respect of the site, or
  - (b) there are insufficient funds in the biobank site account relating to the biobank site to meet the next scheduled management payment when it becomes payable.
- (5) The Minister is authorised to extend the time for payment of a contribution or part of a contribution payable under this clause.

## **Part 4 Biodiversity credits**

### **19 Retirement of biodiversity credits**

- (1) An application for the retirement of a biodiversity credit must:
  - (a) be made in an approved form, and
  - (b) include or be accompanied by any information or document specified in the approved form, and
  - (c) be accompanied by a fee of 5 fee units.
- (2) The Director-General may refuse an application to retire a biodiversity credit if:
  - (a) the application does not comply with the Act or this clause, or
  - (b) the application is illegible or unclear, or
  - (c) any contribution under section 127ZZ of the Act in respect of the application has not been paid, or
  - (d) any amount payable to the Fund in respect of the retirement of the credit has not been paid, or
  - (e) the application is made in purported compliance with a credit retirement condition, credit retirement direction or Part 3A approval but does not comply with the requirements of the condition, direction or approval.
- (3) The Director-General may refund to the applicant the whole or any part of the fee paid in connection with an application if the application is rejected on the grounds provided for by this clause.

(4) In this clause:

**credit retirement direction** means a direction made by the Minister or a court under Part 7A of the Act or under the [National Parks and Wildlife Act 1974](#).

**Part 3A approval** means an approval under Part 3A of the [Environmental Planning and Assessment Act 1979](#) granted by the Minister administering that Act in respect of a project to which that Part applies.

## 20 Verification of retirement of biodiversity credits

The Director-General may issue a statement under section 127ZS (1) of the Act confirming the retirement of biodiversity credits at the request of any person who is entitled to act on an approval or development consent given under Part 3A, 4 or 5 of the [Environmental Planning and Assessment Act 1979](#) in relation to the development described in the biobanking statement to which the credit retirement condition applies.

## 21 Cost recovery—contribution by holders of biodiversity credits under section 127ZZ

- (1) A person who holds a biodiversity credit is required to pay to the Minister a contribution towards the costs referred to in section 127ZZ of the Act when an application is made to the Director-General to retire the biodiversity credit.
- (2) The amount of the contribution is 100 fee units (regardless of the number of credits that is sought to be retired pursuant to the application).
- (3) A person who applies to retire a biodiversity credit or credits is exempt from paying the contribution under this clause, in respect of that application, if the Director-General is satisfied that the biodiversity credit or credits are being retired for the purpose of complying with a credit retirement condition specified in a biobanking statement or a direction made by the Minister under section 127ZR of the Act in connection with a biobanking statement.
- (4) The Minister is authorised to waive payment, or to extend the time for payment, of a contribution or part of a contribution payable under this clause.

## Part 5 Biobanking statements

### 22 Additional grounds for refusal of application for biobanking statement

- (1) In addition to the grounds specified in section 127ZL of the Act, the Director-General may refuse an application for the issue of a biobanking statement if:
  - (a) the application is illegible or unclear, or
  - (b) the application is not accompanied by any fee approved by the Director-General under section 127ZK of the Act, or
  - (c) the application is not accompanied by the contribution required under section

127ZZ of the Act, or

- (d) the applicant fails to provide any further information that the Director-General requests, in connection with the assessment of the application, within the period specified by the Director-General in making the request, or
- (e) the impact assessment or credit retirement assessment that accompanies the application has not been prepared by a person accredited under arrangements instituted under section 142B of the Act or has not been prepared in accordance with the conditions of the person's accreditation under those arrangements, or
- (f) the application relates to a development that has been the subject of a previous application that was refused by the Director-General, and the application is not materially different from the previous application.

(2) In this clause:

***credit retirement assessment*** means the statement referred to in section 127ZK (3) (d) of the Act.

### **23 Cost recovery—contribution by applicants under section 127ZZ**

- (1) A person who applies for a biobanking statement is required to pay to the Minister a contribution towards the costs referred to in section 127ZZ of the Act.
- (2) The contribution is payable when the application is lodged with the Director-General.
- (3) The amount of the contribution is 100 fee units.
- (4) The Minister is authorised to waive payment, or to extend the time for payment, of a contribution or part of a contribution payable under this clause.

### **24 Modification and revocation of biobanking statement**

- (1) An application for the modification or revocation of a biobanking statement:
  - (a) is to be made to the Director-General in an approved form, and
  - (b) is to be accompanied by a fee of 11 fee units, comprised of the following:
    - (i) a non-refundable component of 1 fee unit,
    - (ii) a refundable component of 10 fee units.
- (2) The Director-General may refuse an application for the modification or revocation of a biobanking statement:
  - (a) if the application is illegible or unclear, or
  - (b) if the application is not accompanied by the fee required in respect of the

application, or

(c) for any other reason specified in section 127ZL of the Act that is relevant to the application.

(3) The Director-General may refund the whole or any part of the refundable component of the fee paid in respect of an application.

## **Part 6 Payments to Fund on first transfer of biodiversity credits**

### **25 Payment of amount to Fund on first transfer of credit**

- (1) An amount, calculated as provided by this Part, is to be paid into the Fund before a first transfer of a biodiversity credit is registered under the Act.
- (2) If an application for registration of a first transfer is made in respect of all the biodiversity credits created in respect of a biobank site, the amount payable into the Fund before that transfer is registered is the total Fund deposit for the biobank site in respect of which the biodiversity credits were created.
- (3) If an application for registration of a first transfer is made in respect of a number of biodiversity credits that is less than the number of biodiversity credits created in respect of the biobank site, the amount payable into the Fund before that transfer is registered is (subject to this clause) the relevant proportion of the total Fund deposit for the biobank site, or the proceeds of sale of the biodiversity credits, whichever amount is the greater.
- (4) The **relevant proportion** of the total Fund deposit for a biobank site is the proportion that the number of credits to be transferred bears to the number of credits created in respect of the biobank site.
- (5) The **proceeds of sale** of a biodiversity credit is the consideration (if any) for the transfer of the biodiversity credit.
- (6) If the payment of an amount into the Fund in respect of a first transfer of biodiversity credits would result in the total Fund deposit for the biobank site being exceeded, the amount payable into the Fund is to be reduced by the amount by which the payment would exceed the total Fund deposit.
- (7) If the payment of an amount into the Fund results in the total Fund deposit for a biobank site having been paid into the Fund, no further amount is payable into the Fund in respect of any first transfer of biodiversity credits created in respect of that biobank site.

### **26 Total Fund deposit—meaning**

- (1) The **total Fund deposit** for a biobank site is an amount determined by the Director-General, in accordance with this Part, as the present value of the total of all scheduled

management payments in respect of the biobank site for the period that starts from the time the agreement is entered into and extends to perpetuity.

**Note—**

Scheduled management payments are management payments as specified in the relevant biobanking agreement.

- (2) For the purpose of making a present value calculation, the discount rate determined by the Director-General, as provided for by clause 27, is to be adopted.

**27 Discount rates**

- (1) The Director-General may, by order published in the Gazette, determine the discount rate or rates to be applied for the purpose of determining the total Fund deposit for a biobank site.
- (2) An order under this clause may require any rate published by the Reserve Bank of Australia, or any authorised deposit-taking institution, as applicable on a specified date or from time to time, to be applied for the purpose of determining the total Fund deposit.
- (3) An order under this clause may require a different discount rate to be applied according to different factors.

**28 Part extends to retirement of credits without first transfer**

If a biodiversity credit is proposed to be retired without having been transferred by the owner of a biobank site, the amount that would have been payable if the biodiversity credit had been transferred is to be paid into the Fund before the credit is retired and, for the purpose of calculating the amount payable, a reference in this Part to the credits being transferred is to be read as a reference to the credits being retired (without having been transferred).

**Part 7 Biobanking Trust Fund**

**29 Payment of management payments from Fund**

- (1) The Minister may direct the payment of amounts out of the Fund to the owner of a biobank site, as referred to in section 127ZW (3) (a) of the Act, so as to facilitate the payment of the management costs of the biobank site.
- (2) The management costs of a biobank site are costs incurred or that may be incurred by the owner of a biobank site in respect of the management actions carried out, being carried out or to be carried out under the biobanking agreement, including, but not limited to, the following:
  - (a) any costs associated with project-managing the biobank site,
  - (b) labour and capital costs incurred in connection with the management actions

required under the biobanking agreement (including the costs of raw materials and equipment),

(c) costs associated with complying with reporting or audit requirements under the biobanking scheme,

(d) any rates, taxes or charges levied on the biobank site or the management actions required under the biobanking agreement,

(e) any fees payable by the biobank site owner under the biobanking scheme (other than amounts payable to the Fund on a first transfer of biodiversity credits).

(3) Payments may be made in respect of any period after the relevant biobanking agreement is entered into.

(4) Any such payment is referred to in this Regulation as a **management payment**.

(5) The maximum amount of the management payment for a particular period is the scheduled management payment for that period.

(6) The **scheduled management payment** for a period is the amount specified in the relevant biobanking agreement as the amount that will be paid (subject to this Part) to the owner of the biobank site, as a management payment, in respect of the relevant period if all conditions precedent to the payment that are specified in the agreement are met.

### **30 Separate accounts to be kept in relation to each biobank site**

(1) The Fund Manager is to keep a separate account in relation to each biobank site (a **biobank site account**) that records the following:

(a) payments paid into the Fund in respect of a transfer of biodiversity credits created in respect of that biobank site (as referred to in section 127ZW (2) (a) of the Act),

(b) management payments paid out of the Fund in respect of the biobank site.

(2) Money held in each biobank site account may be invested as a common pool. The proceeds of investment are to be distributed among the biobank site accounts that contributed to the common pool according to the amount contributed, or in such other manner as the Minister directs.

(3) The Fund Manager may keep one or more other accounts (referred to in this Part as a **general account**) in relation to any amounts paid into or out of the Fund that are not recorded in a biobank site account.

(4) Payments made into or out of the Fund that are not referred to in subclauses (1) and (2) are to be recorded in the accounts of the Fund in accordance with the directions of the Minister.

### 31 Account balances

- (1) The Fund Manager is to advise the Minister, at the end of each financial year and at such other times as may be required by the Minister, of the following:
  - (a) the balance of each biobank site account,
  - (b) any operational deficit or operational surplus in a biobank site account.
- (2) For the purposes of this Part, a biobank site account has an **operational deficit** if the balance of the account is less than the total present value of all scheduled management payments in respect of the biobank site for the period starting from the most recent anniversary of the date on which the biobanking agreement was entered into and extending to perpetuity. The amount of the shortfall is referred to as the **operational deficit amount**.
- (3) For the purposes of this Part, a biobank site account has an **operational surplus** if the balance of the account exceeds the total present value of all scheduled management payments in respect of the biobank site for the period starting from the most recent anniversary of the date on which the biobanking agreement was entered into and extending to perpetuity. The amount of the excess is referred to as the **operational surplus amount**.

### 32 Payments from biobank site account that has an operational deficit

- (1) The Minister may direct the Fund Manager that a management payment or payments for a biobank site not be made from the Fund, or be reduced, for any specified period or until further notice, if:
  - (a) the biobank site account for that biobank site has an operational deficit, and
  - (b) the operational deficit amount exceeds the operational deficit threshold for the biobank site account, and
  - (c) the owner of the biobank site concerned agrees to the direction.
- (2) The **operational deficit threshold** for a biobank site account is:
  - (a) 20% of the total present value of all scheduled management payments in respect of the biobank site for the period starting from the most recent anniversary of the date on which the biobanking agreement was entered into and extending to perpetuity, or
  - (b) such other amount as the Minister determines, having regard to the advice of the Fund Manager.
- (3) This clause is subject to clause 34 (Payments from biobank site account that has insufficient funds to cover payment).

### **33 Payments from biobank site account that has an operational surplus**

- (1) The Minister may, in addition to directing any management payment to be paid from the Fund, direct the Fund Manager to pay from the Fund to the owner of a biobank site any amount standing to the credit of the biobank site account for that biobank site if:
  - (a) the biobank site account has an operational surplus, and
  - (b) the operational surplus amount exceeds the maximum operational surplus for the biobank site account, and
  - (c) the amount that the Minister directs to be paid from the Fund does not exceed the difference between the operational surplus amount and the maximum operational surplus.
- (2) The **maximum operational surplus** for a biobank site account is:
  - (a) 30% of the total present value of all scheduled management payments in respect of the biobank site for the period starting from the most recent anniversary of the date on which the biobanking agreement was entered into and extending to perpetuity, or
  - (b) such other amount as the Minister determines, having regard to the advice of the Fund Manager.
- (3) The Fund Manager is to adjust the balance of the biobank site account concerned to reflect a payment made out of the Fund under this clause.
- (4) For the purposes of section 127ZW (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.

### **34 Payments from biobank site account that has insufficient funds to cover payment**

- (1) If there are no funds available in a biobank site account for a biobank site, no management payments are to be paid from the Fund in respect of that biobank site.
- (2) If the balance of a biobank site account for a biobank site is insufficient to cover any scheduled management payment, any management payment paid from the Fund in respect of that biobank site is to be reduced so that the balance of the biobank site account is sufficient to cover the payment.

### **35 Termination of biobank site account**

- (1) If a biobanking agreement is terminated, the Minister may direct the Fund Manager to close the biobank site account that relates to the biobank site concerned and to transfer the balance of that account (if any) to a general account.
- (2) The Minister may, at any time, direct the Fund Manager:



- (a) to distribute all or part of the proceeds of a closed biobank site account among any biobank site accounts in respect of which the total Fund deposit has been paid but which have an operational deficit, or
  - (b) to pay out of the Fund, to the Minister or a person or body specified by the Minister, all or part of the proceeds of a closed biobank site account, for the purpose of facilitating the purchase by the Minister, and retirement, of any biodiversity credits, or
  - (c) to pay out of the Fund, to the owner of the biobank site to which the closed biobank site account relates, any part of the proceeds of the closed account that is an operational surplus amount, but only if the biobanking agreement relating to the biobank site was terminated by the Minister under section 127Q (6) or 127S (1) of the Act.
- (3) If a biobank site account to which an amount is distributed under subclause (2) (a) subsequently ceases to have an operational deficit, the Minister may direct the Fund Manager to deduct from that biobank site account the amount distributed to it and transfer that amount to a general account.
- (4) For the purposes of determining an operational surplus amount for a closed biobank site account, the present value of all scheduled management payments in respect of the biobank site is to be calculated as if the biobanking agreement had not been terminated and had continued to have effect in perpetuity.
- (5) For the purposes of section 127ZW (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.
- (6) This clause does not apply in respect of a biobanking agreement that is terminated because the land established as a biobank site under the agreement is reserved under Part 4 or 4A of the *National Parks and Wildlife Act 1974* (as referred to in section 127ZZH of the Act).

### **36 Biobank sites that become national parks or other reserves**

- (1) If a biobanking agreement is terminated because the land established as a biobank site under the agreement is reserved under Part 4 or 4A of the *National Parks and Wildlife Act 1974* (as referred to in section 127ZZH of the Act), the Fund Manager is to continue to keep a separate account that records the payments into or out of the Fund that relate to that former biobank site.
- (2) The Minister may direct the Fund Manager to pay out of the Fund to any person or body responsible for the care, control or management of the former biobank site any amount held in the Fund that is credited to that account for the purpose of assisting the person or body to manage the land in a manner that is consistent with the objects

of the Act.

- (3) For the purposes of section 127ZW (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.
- (4) If an account relating to a biobank site referred to in subclause (1) has no remaining funds, the Minister may direct the Fund Manager to close the biobank site account that relates to the biobank site concerned.

### **37 Environmental Trust may be appointed as Fund Manager**

- (1) The Minister may appoint the Environmental Trust established by the *Environmental Trust Act 1998* as Fund Manager if the Minister administering that Act approves of the Environmental Trust engaging in the activities of Fund Manager (under section 8 (d) of that Act).
- (2) This clause does not prevent the appointment of another person or body as Fund Manager.

### **38 Annual report of Fund Manager**

- (1) As soon as practicable after 30 June in each year, the Fund Manager is to prepare and deliver to the Minister a report on its management of the Fund during the financial year ending on that date.
- (2) The report must include copies of the financial statements and accounts of the Fund Manager for the financial year to which the report relates and an auditor's report on those statements and accounts prepared by an auditor approved by the Minister.
- (3) As soon as practicable after the report is delivered to the Minister, the Minister is:
  - (a) to table the report (or cause it to be tabled) in both Houses of Parliament, and
  - (b) to cause the report to be published on the website of the Department.
- (4) The first report under this clause is to be given in respect of the period from the date of commencement of this Regulation to 30 June immediately following that date.

### **39 Quarterly report of Fund Manager**

- (1) As soon as practicable after a quarterly reporting date in each year, the Fund Manager is to prepare and deliver to the Minister a report that summarises the financial position of the Fund and the performance of investments of money vested in the Fund during the 3 months immediately preceding the quarterly reporting date.
- (2) As soon as practicable after a report is delivered to the Minister, the Minister is to cause the report to be published on the website of the Department.

- (3) The first report under this clause is to be given in respect of the period from the date of commencement of this Regulation to the quarterly reporting date immediately following that date.
- (4) In this clause, a **quarterly reporting date** means a date of 31 March, 30 June, 30 September or 31 December in any year.

#### **40 Fund to be kept separate from other accounts**

The Fund Manager is to keep a separate account in relation to money held in the Fund (including the investments of the Fund).

#### **41 Insurance**

The Fund Manager must take out and maintain a policy of indemnity insurance, in respect of the exercise of its functions as Fund Manager, that complies with any requirements specified by the Minister by notice in writing to the Fund Manager.

#### **42 Winding up of Fund**

- (1) The Minister may direct the Fund Manager to wind up the Fund if the Minister is of the opinion that the balance of the Fund is insufficient to meet Fund Manager liabilities.
- (2) For the purposes of this clause, **Fund Manager liabilities** are:
  - (a) the remuneration of the Fund Manager, and
  - (b) any liabilities incurred by the Fund Manager in the exercise of its functions as Fund Manager.
- (3) For the purposes of winding up the Fund, the Fund Manager is to close all accounts in the Fund and distribute the proceeds of the Fund in accordance with this clause and any directions of the Minister.
- (4) Priority in the distribution of the proceeds of the Fund is to be given to the payment of Fund Manager liabilities.
- (5) The proceeds of a biobank site account (after payment of Fund Manager liabilities) are to be paid to the owner of the biobank site.
- (6) The proceeds of a general account (after payment of Fund Manager liabilities) may be either distributed among owners of biobank sites or used for the purpose of facilitating the purchase and retirement of biodiversity credits, or both, as directed by the Minister.

#### **43 Committees**

- (1) The Minister may establish one or more committees, in such manner as the Minister considers appropriate, to advise the Fund Manager on the exercise of the Fund

Manager's functions under the Act or to oversee the exercise of those functions.

- (2) A committee has such functions as are conferred or imposed on it by the Minister.

#### **44 Directions by Minister**

- (1) Directions by the Minister to the Fund Manager are to be made in writing.
- (2) Any such direction may be amended, replaced or revoked by the giving of a further direction to the Fund Manager.
- (3) The Fund Manager is to act in accordance with any direction given by the Minister under this Part.

### **Part 8 Registers**

#### **45 Register of biobank sites**

- (1) The register of biobank sites is to contain the following information in relation to each biobank site, in addition to the information mentioned in section 127ZZB (2) of the Act:
  - (a) a copy of any variation made to the biobanking agreement relating to the biobank site,
  - (b) the name of the owner (for the time being) of the biobank site,
  - (c) a copy of any management plan in relation to the biobank site that is prepared in accordance with the requirements of the relevant biobanking agreement, including any amendments to such a plan.

**Note—**

Section 127ZZB of the Act also requires the location of the biobank site, and a copy of the biobanking agreement relating to the biobank site, to be included on the register.

- (2) The register of biobank sites is to contain, in relation to any biobank site the registration of which is suspended, all the information that it would be required to contain if registration were in force.
- (3) The register of biobank sites is to contain the following information in relation to any biobank site the registration of which has been cancelled:
  - (a) the location of the biobank site,
  - (b) a copy of the biobanking agreement relating to the biobank site (as in force immediately before the cancellation of registration).

#### **46 Register of biodiversity credits**

- (1) The register of biodiversity credits is to contain the following information, in addition to the information mentioned in section 127ZZC (2) of the Act:
  - (a) contact details for the current holder of the biodiversity credit or the holder's conservation broker (if any),
  - (b) the date or dates of any transfer of the biodiversity credit,
  - (c) the consideration paid for the transfer or transfers.
- (2) The names of any previous holders of a biodiversity credit, as recorded on the register, are not to be made available to the public under section 127ZZC of the Act.

#### **47 Register of biobanking statements**

- (1) The register of biobanking statements is to include the following information, in addition to the information mentioned in section 127ZZD (2) of the Act:
  - (a) particulars of the status of the biobanking statement, including:
    - (i) the date of issue and whether the statement is still in force or has ceased to have effect,
    - (ii) whether the requirements of the biobanking statement have been incorporated in any development consent or approval under the *Environmental Planning and Assessment Act 1979*,
    - (iii) whether the credit retirement conditions of the statement have been met,
  - (b) particulars of any biodiversity credits that have been retired for the purpose of complying with a credit retirement condition specified in the statement.
- (2) If the Director-General issues a biobanking statement in respect of development that can be regarded as improving or maintaining biodiversity values only if the Director-General makes a determination of a kind referred to in clause 3, the Director-General must:
  - (a) record the reasons for that determination, and cause a copy of those reasons to be published on the register of biobanking statements, and
  - (b) cause a copy of the impact assessment relating to the application for a biobanking statement to be published on the register of biobanking statements.

**Note—**

Clause 3 relates to development having an impact on areas identified by the methodology as having high biodiversity conservation values.

#### **48 Information not to be disclosed on registers**

- (1) The following information, if contained on a register, is not to be made available to the public:
  - (a) information relating to the location of threatened species, populations or ecological communities, if the Director-General is of the opinion that it is in the public interest that the information not be disclosed,
  - (b) information relating to the location of critical habitat or any area or areas of land proposed to be identified as critical habitat, if the Director-General has determined under section 146 of the Act that such a location should not be disclosed to the public,
  - (c) any personal information, unless the requirements of section 57 of the *Privacy and Personal Information Protection Act 1998* are met.
- (2) Any provisions of a biobanking agreement or biobanking statement that contain information that is not to be made available to the public are to be deleted from or otherwise obscured in any copy of the agreement or statement that is made available for public inspection on a register.

#### **49 Arrangements for public access generally**

The Director-General may put in place arrangements that limit public access to a register for the purpose of ensuring that any personal information kept on the register is used only for the purposes that relate to the purposes of the register.

#### **50 Provision of copies of registers**

- (1) The prescribed fee for the provision of paper copies of information on a register is \$10, plus \$1 for each page provided.
- (2) The Director-General may refuse to provide copies of information on a register if the work involved in dealing with the provision of the information would, if carried out, substantially and unreasonably divert the Department's resources away from their use by the Department in the exercise of its functions.
- (3) Subclause (2) does not affect the requirement under the Act that information on a register be made available for public inspection at the head office of the Department and on the website of the Department.

### **Part 9 Miscellaneous**

#### **51 Calculation of fee unit**

- (1) For the purposes of this Regulation, a fee unit is \$100 (***the base amount***) or, if an adjustment is made to the base amount in accordance with this clause, the base

amount as so adjusted.

- (2) On each adjustment date (starting with the adjustment date in 2009), the base amount is to be adjusted in accordance with the following formula:

$$A \times B/C$$

where:

**A** is the base amount (that is, \$100).

**B** is the CPI number for the June quarter immediately preceding the adjustment date.

**C** is the CPI number for the June quarter of 2008.

- (3) For the purposes of this clause, an **adjustment date** is the first day of the month after the month in which the CPI number for the June quarter for a year is first published by the Australian Statistician.
- (4) An amount calculated under this clause is to be rounded to the nearest whole dollar and, if the amount to be rounded is 50 cents, is to be rounded up.
- (5) The Director-General is to cause the amount of a fee unit to be published on the website of the Department.
- (6) In this clause:
- CPI number** means the Consumer Price Index (All Groups Index) for Sydney published by the Australian Statistician.

## 52 Withdrawal of applications

- (1) An application under Part 7A of the Act may be withdrawn at any time prior to its determination by service on the Minister or the Director-General of a notice to that effect signed by the applicant.
- (2) In this clause, an **application under Part 7A of the Act** means:
- (a) an application to enter into a biobanking agreement, or
  - (b) an application for consent to the variation of a biobanking agreement, or
  - (c) an application to retire a biodiversity credit, or
  - (d) an application for the issue, or modification or revocation, of a biobanking statement.