

ATTACHMENT A

Biodiversity Certification of Land at Warnervale Town Centre

Recommendation Report

For conferring or refusing to confer biodiversity certification of land under section 126H of the *Threatened Species Conservation Act 1995*

Name of recommending officer:	Monica Collins
Name of decision maker:	Minister administering the <i>Threatened Species Conservation Act 1995</i>
File / Folio number:	FIL08/9854-05/DOC13/87021
Name of Planning Authority (applicant):	Wyong Shire Council
Date application received:	15 January 2013
Dates of public notification under s126N:	22 January 2013 – 25 February 2013

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1 Background and documents received

1.1 Background and purpose of the application

Development of the Warnervale Town Centre has been a long standing Government commitment. Warnervale Town Centre is anticipated to contribute 1,650 dwellings and 1,200 job opportunities to the housing and employment targets identified in the Central Coast Regional Strategy.

Wyong Shire Council has applied for biodiversity certification of Warnervale Town Centre. A copy of the application, as amended by council, is in **Appendix 5**. A biodiversity certification application under the *Threatened Species Conservation Act 1995* offers planning authorities a streamlined biodiversity assessment process for areas identified for development at the strategic planning stage along with a range of options for offsetting impacts on biodiversity. The effects of biodiversity certification are set out in section 126I of the *Threatened Species Conservation Act 1995*. One of the effects is that development on biodiversity certified land is taken, for the purposes of Part 4 of the *Environmental Planning and Assessment Act 1979*, to be development that is not likely to significantly affect any threatened species, population or ecological community listed under the *Threatened Species Conservation Act 1995*, or its habitat.

The application does not include any conservation areas within the town centre area proposed to be certified, but an offset funding program will enable conservation outcomes in the region.

The biodiversity offset fund comprises \$4 million in special infrastructure contributions (SIC) which has been discounted by 50 per cent by government, with a government commitment to contribute the remaining 50 per cent. This funding will enable the Office of Environment and Heritage to finance a mixture of land acquisition for conservation, conservation agreements and the purchase and retirement of BioBanking credits to offset impacts on the area proposed for biodiversity certification. The use of an offset program coordinated through the Environmental Trust will enable the achievement of strategic conservation outcomes by focussing on areas of regional conservation priority, and delivering long term conservation security.

1.2 Documents provided by the applicant that were considered

1. Biodiversity certification application (15 January 2013) and amended application (9 May 2013)
2. Warnervale Town Centre Biodiversity Certification Strategy FINAL (21 March 2012)
3. Biodiversity Certification Assessment Report for the Warnervale Town Centre FINAL (21 March 2012)
4. Ministerial determination relating to "Development Contributions for the Warnervale Town Centre" (30 October 2008)
5. Special Contributions Area (Warnervale) Order 2008 (14 November 2008)
6. Public submissions including letters from the Australian Government Department of the Environment (previously Sustainability, Environment, Water, Population and Communities), the NSW Department of Primary Industries, Wyong Shire Council (two), the Community Environment Network Inc, and Mr Phil Conacher (two) (**Appendix 2**)

1.3 Other documents that were taken into consideration

7. Warnervale Town Centre – Special Infrastructure Contributions Plan (October 2008)
8. Direction under s94 EF of the Act – Special Contributions Area Warnervale Town Centre – Letter to Wyong Shire Council (30 October 2008)
9. Letter from the NSW Environmental Trust giving in-principle agreement to administering the Special Infrastructure Contribution funds arising from the Warnervale Town Centre Biodiversity Offset Program (4 April 2012)
10. Media release: NSW Government extends development (SIC) levy discount (28 June 2012)
11. Letter from the Office of Environment and Heritage to Wyong Shire Council regarding documents to be publicly exhibited as part of Warnervale Town Centre Biocertification Application (16 November 2012)
 - i. Information sheet on Special Infrastructure Contributions for proposed Warnervale Town Centre Biodiversity Certification – Attachment 1
 - ii. Fact Sheet outlining the principles for the expenditure by the Office of Environment and Heritage of the financial contributions and levy funds (16 November 2012) – Attachment 2
 - iii. Letter from the Treasurer confirming Government's commitment to a financial contribution for Warnervale Town Centre and giving in-principle support to the indexing of contributions (15 November 2012) - Attachment 3
12. Draft comprehensive (Standard Instrument) LEP 2012 (Wyong Shire Council)
13. Wyong Local Environmental Plan 1991 – Warnervale Town Centre – Land Reservation Acquisition Map (12 October 2011)
14. Bell, S. J. The natural vegetation of the Wyong Local Government Area, Central Coast, New South Wales. Vegetation Community Profiles and Maps. (December 2002)
15. Final determination of "Lower Hunter Spotted Gum Ironbark Forest in the Sydney Basin Bioregion" (2005/2010) by the NSW Scientific Committee established under the *Threatened Species Conservation Act 1995*
16. Bell, S. J. Lower Hunter Spotted Gum Ironbark Forest EEC in the Warnervale Area, Wyong Shire (29 September 2010)
17. Turner, K. (7 November 2011) "A brief independent review of whether vegetation on lands in the Warnervale area substantially conform with the final determination of the Lower Hunter Spotted Gum-Ironbark Forest EEC"
18. Letter from the Office of Environment and Heritage to Wyong Shire Council regarding Lower Hunter Spotted Gum Ironbark Forest in Warnervale Town Centre (30 September 2011)
19. Bell, S.A.J. (February 2013) "Defining and mapping rare vegetation communities: improving techniques to assist land-use planning and conservation". Thesis submitted for the degree of Doctor of Philosophy, University of Newcastle
20. Letter from the Office of Environment and Heritage to Wyong Shire Council re the *Corunastylis* sp. Charmhaven orchid at Warnervale Town Centre (20 April 2013)
21. Biodiversity Certification Assessment Methodology (DECCW February 2011)
22. Draft Plan of Management – Warnervale Heath Wrinklewort Reserve (prepared for RailCorp by ecological Australia, June 2009)
23. Area Map of North Warnervale Train Station (from Species Impact Statement, 26 June 2007)

2 Evaluation

The Office of Environment and Heritage has reviewed the application for Biodiversity Certification of the Warnervale Town Centre.

2.1 Statutory matters considered prior to a decision on whether to confer Biodiversity Certification

1. The application was publicly exhibited from 22 January 2013 to 25 February 2013 in accordance with the statutory requirements.

2. The application is by a planning authority (Wyang Shire Council), to the Minister, in the required form. The application is in accordance with the Biodiversity Certification Assessment Methodology as proposed to be varied in this report and addresses the methodology sufficiently.

3. Biodiversity Certification Application: A Biodiversity Certification Assessment Report, a Biodiversity Certification Strategy, and an application form were provided by council. These documents were amended as a response to issues raised during public notification. There is sufficient information provided to enable assessment and a decision to be made as to whether biodiversity certification can be conferred.

4. Land proposed for biodiversity certification: The area subject to biodiversity certification is defined by a map and is presented in the strategy, but has been amended by Council as a response to submissions. The revised map is attached (**Appendix 1**).

5. Proposed conservation measures: There is no land set aside as conservation offsets on the town centre site. Biodiversity offsets will be purchased offsite using financial contributions from a Special Infrastructure Contribution (discounted by the NSW government with a commitment to pay the balance). The Environmental Trust will be responsible for the coordination of these contributions through an offset program which will be implemented by the Office of Environment and Heritage. The process for managing the funds is presented in the attached Special Infrastructure Contribution protocol (**Appendix 4**).

The Office of Environment and Heritage will be responsible for ensuring that the offsets are purchased in accordance with the offset requirements identified in the Biodiversity Certification Assessment Methodology. The credit profiles (i.e. the appropriate types of vegetation proposed for biodiversity conservation) are outlined in the biodiversity certification strategy. Three of the four vegetation types can be offset within five Catchment Management Authority (CMA) subregions. Swamp Mahogany swamp forest on coastal lowlands of the North Coast and northern Sydney Basin can only be offset within the Wyong CMA region. **Appendix 4** provides more detail on the proposed conservation measures.

6. Public submissions: Seven public submissions were received within the specified 30 days. The original submissions are included in **Appendix 2**. The submissions were considered and changes to the application on the basis of these submissions are explained in Table 1. Greater detail is supplied in **Appendix 3**.

7. Improving or maintaining biodiversity values: Under s126O of the *Threatened Species Conservation Act 1995*, the Minister may confer biodiversity certification only if it improves or maintains biodiversity values.

Under s126P of the *Threatened Species Conservation Act 1995*, biodiversity certification improves or maintains biodiversity values only if the Minister determines, on the basis of a biodiversity certification assessment, that the overall effect of biodiversity certification is to improve or maintain biodiversity values.

A biodiversity certification assessment is an assessment of the effect of biodiversity certification on biodiversity values. Under s126P of the *Threatened Species Conservation Act 1995*, a biodiversity certification assessment is to be made in accordance with the biodiversity certification assessment methodology, and not otherwise. However, s126Q enables the Minister to permit variations to the methodology in certain circumstances.

The amended application in **Appendix 5** has been made in accordance with the methodology as proposed to be varied by the Minister (see below).

2.2 Recommendations to the Minister to approve minor variations to the Biodiversity Certification Assessment Methodology

Section 126Q of the *Threatened Species Conservation Act 1995* states:

- (1) The Minister may, for the purpose of a biodiversity certification assessment, permit a variation to be made to the biodiversity certification assessment methodology if the Minister is of the opinion that:
 - (a) the variation to the methodology is minor, and
 - (b) the variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
 - (c) strict adherence to the methodology is in the particular case unreasonable and unnecessary.

1. Biodiversity Certification Agreement

It is proposed to vary section 9.3 of the Biodiversity Certification Assessment Methodology for the purpose of the biodiversity certification assessment of Warnervale Town Centre in relation to the requirement for a financial contribution to be secured by a Biodiversity Certification Agreement. The Office of Environment and Heritage considers that adherence to this requirement is unnecessary and unreasonable because a 50 per cent proportion of the financial contribution will be provided by the NSW government. When the Special Infrastructure Contribution was discounted by the NSW government as part of a comprehensive package to boost housing supply across the state, the Treasurer assured the Minister that the NSW government will fund the difference in the contributions (50 per cent). The variation is minor in that it will not impact on the ability to deliver the conservation measures, and therefore any determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values.

It is proposed to vary the methodology by deleting of the following text from page 57 of the methodology:

“The arrangements for making a financial contribution, as identified in accordance with this section, will need to be secured in a Biodiversity Certification Agreement. In particular, the Biodiversity Certification Agreement will need to ensure that:

- *all relevant parties are party to the Biodiversity Certification Agreement, for example, the relevant third party where the financial contribution is to be paid to a third party to secure the offset sites*
- *the financial contribution is only applied towards conservation measures which will generate credits which meet the requirements of the offset rules in section 10 of the methodology.”*

It is recommended that the Minister:

(a) form the opinion that:

- this variation to the methodology is minor, and
- this variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary; and

(b) permit this variation to the methodology under s126Q of the *Threatened Species Conservation Act 1995* to enable the financial contributions from the NSW Government to be provided without a biodiversity certification agreement for the following reasons:

- the Treasurer confirmed on the 15 November 2012 Government's commitment to a financial contribution for Warnervale Town Centre in a letter to the Office of Environment and Heritage.
- the Allocation Protocol provided by the Office of Environment and Heritage and the Department of Planning and Infrastructure has agreed to transferring \$2,000,000 to the Environmental Trust for offsetting the impacts on biodiversity of the development of Warnervale Town Centre.
- the Environmental Trust will be directed through a Business Plan which ensures that the funds will be used for the purchase of conservation measures in accordance with the methodology, and thus will contribute to the achievement of an improve or maintain outcome.

2. *Spotted Gum Ironbark Forest*

Background

The applicant, Wyong Shire Council, decided in accordance with advice from their ecological consultants (Eco Logical Australia Pty Ltd) that the Spotted Gum Ironbark Forest within the Biodiversity Certification Assessment Area is not the *Lower Hunter Spotted Gum - Ironbark Forest in the Sydney Basin Bioregion* endangered ecological community listed under the *Threatened Species Conservation Act 1995*.

As this opinion differed from the opinion of other reputable botanists (e.g. Dr Stephen Bell and Mr Travis Peake), the Office of Environment and Heritage instigated a scientific forum to discuss this matter and asked for independent advice (Mr Ken Turner, Office of Environment and Heritage Science Division). Mr Turner produced a brief review of the arguments and concluded that the vegetation does not match the definition of the endangered ecological community provided by the Scientific Committee's Final Determination of 5 November 2010. The Office of Environment and Heritage accepted this advice and notified Wyong Shire Council.

The differences of opinion between scientists centred on several aspects of the description of the endangered ecological community in the final determination written by the NSW Scientific Committee. The main point of contention is whether an endangered ecological community called the *Lower Hunter Spotted Gum - Ironbark Forest* can be found outside the Lower Hunter, and whether the vegetation found at Warnervale corresponds to the description of the community. Other matters included the presence or absence of key species and the geological formations on which this endangered ecological community can be found.

Recently a reputable scientist, Stephen Bell, made public his PhD thesis which investigates mapping of this endangered ecological community. Chapter 4 of this work indicates that the Spotted Gum Ironbark vegetation in selected parts of Wyong should be considered the Lower Hunter Spotted Gum – Ironbark endangered ecological community. Bell refers to this community as ‘candidate’ endangered ecological community. According to Bell’s thesis, which includes a map of ‘candidate’ Lower Hunter Spotted Gum Ironbark endangered ecological community in the Wyong area, only part of the Spotted Gum Ironbark vegetation in the Warnervale Town Centre can be considered the endangered ecological community (6.5 ha of the 16 ha). The remaining Spotted Gum Ironbark vegetation on site does not fit the definition of the community. Of the 6.5 ha of potential endangered ecological community on the site, 1.9 ha will be removed under the present biodiversity certification proposal and the rest will be conserved within the Warnervale Daisy Reserve which is subject to a separate planning process.

Legislative framework

Under s126O of the *Threatened Species Conservation Act 1995*, the Minister may confer biodiversity certification only if it improves or maintains biodiversity values.

Under s126P of the *Threatened Species Conservation Act 1995*, biodiversity certification improves or maintains biodiversity values only if the Minister determines, on the basis of a biodiversity certification assessment, that the overall effect of biodiversity certification is to improve or maintain biodiversity values.

A biodiversity certification assessment is an assessment of the effect of biodiversity certification on biodiversity values. Under s126P of the *Threatened Species Conservation Act 1995*, a biodiversity certification assessment is to be made in accordance with the biodiversity certification assessment methodology, and not otherwise. However, s126Q enables the Minister to permit variations to the methodology in certain circumstances.

Where biodiversity certification would directly impact on biodiversity values in a red flag area, the methodology states that biodiversity values are to be regarded as being improved or maintained if the Director General is satisfied, having considered the criteria in section 2.4 of the methodology, that impacts on that area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

The Office of Environment and Heritage has decided to take a precautionary approach and accepted that the 1.9 ha area of Spotted Gum Ironbark vegetation is an endangered ecological community for the purposes of this assessment. This decision then means that:

- (a) the criteria in sections 2.4.1 and 2.4.2 of the existing methodology would be relevant

- (b) council's application has not addressed these criteria since council's consultant determined that it was not an endangered ecological community
- (c) the Director General could not be satisfied that the application addresses, considers or demonstrates the matters listed in 2.4.1 and 2.4.2.

Office of Environment and Heritage has therefore reviewed the criteria listed under 2.4.1 and 2.4.2.

Assessment of 2.4.1 and 2.4.2

2.4.1

It cannot be assumed that Wyong Shire Council has taken all reasonable measures to avoid adverse impacts on the red flag area and to reduce impacts of development on vegetation remaining within the biodiversity certification area, nor can it be assumed that Council will have considered whether appropriate conservation management arrangements could be established over the red flag area, as Wyong Shire Council's consultant determined that this vegetation community is not an endangered ecological community. The Office of Environment and Heritage therefore proposes to ask the Minister to allow a minor variation to the methodology by deleting 2.4.1 for the 1.9 ha of Spotted Gum – Ironbark vegetation within the Warnervale Town Centre biodiversity certification area.

It is proposed to vary the methodology by deleting the following text from page 8 of the methodology:

2.4.1 Feasibility of options to avoid impacts on red flag area(s) where biodiversity certification is conferred

The Director General must be satisfied that the feasibility of options to avoid impacts on red flag areas has been considered in the application for biodiversity certification. An application for biodiversity certification can address this requirement by demonstrating that:

- a) all reasonable measures have been taken to avoid adverse impacts on the red flag areas and to reduce impacts of development on vegetation remaining within the biodiversity certification area*
- b) appropriate conservation management arrangements cannot be established over the red flag area given its current ownership, status under a regional plan and zoning and the likely costs of future management.*

In addressing the criteria for a), the application for biodiversity certification may include information that demonstrates:

- how the subdivision design, (including the configuration of lots, minimum lot sizes and/or options for lot averaging and lot clustering) have been used to avoid and minimise impacts on red flag areas*
- how the spatial distribution, configuration, size of patches and connectedness of the red flag areas proposed for conservation measures within the biodiversity certification assessment area have minimised the overall impacts of conferring biodiversity certification on the red flag areas.*

It is recommended that the Minister:

(a) form the opinion that:

- this variation to the methodology is minor, and

- this variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
 - strict adherence to the methodology is in this particular case unreasonable and unnecessary.
- (b) permit this variation to section 2.4 of the Methodology for the following reasons:

- Wyong Shire Council did not have access to the comprehensive analysis provided by Bell in his thesis finalised in 2013 when the application was made, and it would be unreasonable to expect Wyong Shire Council to revise its application.
- The Office of Environment and Heritage's assessment of the subsequent criteria (2.4.2) indicates that the viability of the red flag area is low or not viable according to criteria 2.4.2.1 d and that the contribution of the 1.9 ha red flag area to regional biodiversity values is low (2.4.2.2).
- 2.4.2.1 d states that the viability of biodiversity values in the red flag area is low or not viable if "the area of a vegetation type in a red flag area on land where biodiversity certification is conferred is minor relative to the area containing that vegetation type on land subject to proposed conservation measures".

Evidence for this position is as follows:

- according to recent research presented in Bell's PhD and his previous mapping of vegetation communities it is shown that 1.9 ha is 0.27 per cent of the remaining estimated 695 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest in Wyong Shire Council. 1.9 ha is an insignificant amount of vegetation within this context, and
- the modelled distribution of this endangered ecological community is estimated at 26,518 ha (Eco Logical Australia 2003) and 4,000 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest is in current reservation in the Lower Hunter region. 1.9 ha can be considered minor within this wider context, and
- the 1.9 ha will be offset according to the offset rules stipulated in section 10 of the methodology. The amount of extant Lower Hunter Spotted Gum – Ironbark Forest vegetation (26,518 ha) indicates that it is likely that conservation outcomes for this vegetation type will be achieved as an outcome of the conservation measures that will be delivered through Biodiversity certification. This will lead to an improved conservation status for this vegetation type.

3. Assessment of indirect impacts on biodiversity values

It is proposed to vary the methodology by deleting "ownership," from page 37 of the methodology.

Section 6 of the Biodiversity Assessment Methodology requires the application to address, to the satisfaction of the Minister, how the proposed ownership, management, zoning and development controls of the land proposed for certification is intended to mitigate any indirect impacts on biodiversity values.

An assessment of how the matter of ownership will mitigate any indirect impacts on biodiversity values was not carried out in the application. However, the Office of Environment and Heritage is of the opinion that Wyong Shire Council has taken responsibility through the Council's Development Control Plan for the mitigation of indirect impacts. Each developer within the biodiversity certification area will have to adhere to the objectives relating to the minimising of indirect impacts, ensuring that the objectives are achieved.

It is recommended that the Minister:

(a) form the opinion that:

- this variation to the methodology is minor, and
- the variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary.

(b) permit this minor variation to the Biodiversity Certification Assessment Methodology, to remove the requirement to address how the proposed ownership of the land proposed for biodiversity certification will mitigate any indirect impacts on biodiversity values.

2.3 Red flag decisions and other Director General decisions under the methodology

Definitions:

A **red-flag** is defined in section 2.3 of the existing Methodology. In brief it is an area regarded as having high conservation values (e.g. an endangered ecological community).

1. Proposed red flag variation for Swamp Mahogany Forest

Biodiversity certification may only be conferred on land where the Minister makes a determination that the conferral of biodiversity certification will improve or maintain biodiversity values. Where biodiversity certification would directly impact on biodiversity values in a red flag area, the existing methodology states that biodiversity values are to be regarded as being improved or maintained if the Director General is satisfied, having considered the criteria in section 2.4 of the methodology that impacts on that area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

Section 2.4 of the methodology provides that where biodiversity certification is proposed to be conferred on land that is, or forms part of, a red flag area, the Director General may decide that the impacts of certification on the red flag area may be offset in accordance with the rules and requirements set out in section 10. In order for the Director General to be satisfied that the impacts on a red flag area are able to be offset, each of the criteria in sections 2.4.1 to 2.4.4 (where relevant) must be met.

The application identifies Swamp Mahogany Forest on 0.1 hectares of the area proposed for biodiversity certification, which is considered to be the *Swamp Sclerophyll Forests on Coastal Floodplains of the New South Wales North Coast, Sydney Basin and South East Corner Bioregions* endangered ecological community listed under the *Threatened Species Conservation Act 1995*.

The application addresses the criteria set out in the relevant parts of section 2.4 (2.4.1 to 2.4.2) of the Biodiversity Certification Assessment Methodology in Appendix 6 of the Biodiversity Certification Assessment Report. Sections 2.4.3 and 2.4.4 are not relevant for this assessment, because they consider threatened species rather than endangered ecological communities.

The main reasons given to justify the variation of the red flag are:

- 2.4.1 of the Methodology requires the Director General to be satisfied that the proponent has taken all reasonable measures to avoid adverse impacts on the red flag area.

The application states that efforts have been made to avoid and minimise impacts on the red flagged vegetation, but complete avoidance has been difficult to achieve. No feasible alternatives for the location of the detention basin were found in spite of efforts made to avoid the removal of this area of endangered ecological community, due to the topography required for its function. The likely outcome for this area is a detention basin, aimed to ensure Water Sensitive Urban Design. However, Council states that it is possible that future plans may avoid some of the impacts on the Swamp Mahogany vegetation. The area is being zoned for Public Recreation in order to provide some protection for biodiversity if it is not removed by the detention basin.

- 2.4.2.1 of the Methodology requires the proponent to demonstrate to the Director General's satisfaction that the viability of the red flag area is low or not viable.

The application states that the viability of the patch of endangered ecological community being impacted is currently low, because it is very small (0.1 ha) and due to the current surrounding land use. The patch of EEC is adjacent to a road and in a generally degraded rural area. Future residential zoning will further isolate the endangered ecological community vegetation. With reduced connectivity, the viability of the vegetation is likely to be compromised. Council has suggested that if the opportunity exists to retain some of this vegetation around the proposed detention basin within a recreation zone, that this will be implemented.

- 2.4.2.2 of the Methodology requires that the proponent demonstrates to the Director General's satisfaction that the red flag area only makes a low contribution to regional biodiversity values. The abundance of this endangered ecological community was analysed within the local government area. The area of impact on this endangered ecological community is 0.1 ha, which makes up <0.001 per cent of the total extent of this vegetation type in the Wyong local government area (1,030 ha). This amount will be an even smaller amount of the total extent of this vegetation type within the Wyong Catchment Management Authority area and adjoining sub-regions.

On the basis of the assessment outlined above, it is recommended that the Director General:

- (a) be satisfied that that the feasibility of options to avoid impacts on this red flag area has been considered in the application for biodiversity certification; and
- (b) be satisfied that the application demonstrates that the viability of the red flag area is low in accordance with 2.4.2.1 a and b;

- (c) be satisfied that the application demonstrates that the red flag area makes a low contribution to regional biodiversity values;
- (d) be satisfied that the impacts of certification on the red flag area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

2. Proposed red flag variation for the Lower Hunter Spotted Gum - Ironbark vegetation

Biodiversity certification may only be conferred on land where the Minister makes a determination that the conferral of biodiversity certification will improve or maintain biodiversity values. Where biodiversity certification would directly impact on biodiversity values in a red flag area, the existing methodology states that biodiversity values are to be regarded as being improved or maintained if the Director General is satisfied, having considered the criteria in section 2.4 of the methodology that impacts on that area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

Section 2.4 of the methodology provides that where biodiversity certification is proposed to be conferred on land that is, or forms part of, a red flag area, the Director General may decide that the impacts of certification on the red flag area may be offset in accordance with the rules and requirements set out in section 10. In order for the Director General to be satisfied that the impacts on a red flag area are able to be offset, each of the criteria in sections 2.4.1 to 2.4.4 (where relevant) must be met.

Recent research has highlighted that 1.9 hectares of the area proposed for biodiversity certification comprises potential Lower Hunter Spotted Gum - Ironbark Forest. No red flag assessment for this vegetation community was carried out by Wyong Shire Council as Council had determined that this vegetation was not attributable to the endangered ecological community. As the Office of Environment and Heritage has accepted that for the purposes of this report the Spotted Gum – Ironbark Forest should be considered an endangered ecological community, a red flag assessment has been carried out.

A recommendation for the Minister to make a minor variation to the methodology to delete 2.4.1 in relation to the Spotted Gum – Ironbark vegetation is set out in section 5.3 of this report.

The Office of Environment and Heritage's assessment of the criteria outlined in 2.4.2 indicates that the viability of the red flag area is low or not viable because;

- the area of a vegetation type in a red flag area on land where biodiversity certification is conferred is minor relative to the area containing that vegetation type on land subject to proposed conservation measures (2.4.2.1 d), and
- that the contribution of the red flag area to regional biodiversity values is low (2.4.2.2).

A detailed assessment of all the criteria in 2.4.2.2 indicates that:

- the conservation measures proposed in this application provide for the purchase of land for conservation and their management, or the purchase of conservation agreements or the funding of BioBanking agreements. The funds will be coordinated by the Environmental Trust and conservation measures will be purchased in accordance with the methodology. The Business Plan

prepared for the Environmental Trust will include a requirement to use the funds for the conservation of this vegetation type if possible.

- it has been calculated that there is 695 ha of candidate Lower Hunter Spotted Gum Ironbark Forest within Wyong Shire Council and 26,518 ha of Lower Hunter Spotted Gum Ironbark Forest in the Lower Hunter region. These figures indicate that there is a high likelihood that Office of Environment and Heritage will be able to secure conservation of the required vegetation type.

Sections 2.4.3 and 2.4.4 are not applicable as they deal with threatened species or areas with regional or state biodiversity conservation significance.

It is proposed to ask the Director General to allow a red flag variation in accordance with section 2.4.2.1 a - d of the Biodiversity Certification Assessment Methodology (criteria to justify red flag variation) under s126Q of the *Threatened Species Conservation Act 1995*. The red flag variation will allow the removal of this small amount of vegetation and require that the biodiversity values are offset in accordance with section 10 of the Methodology. This request for a red flag variation will not affect the result of the determination that the overall effect of biodiversity certification will be to improve or maintain biodiversity values. This will be ensured through the provision of targeted conservation measures for the biodiversity values being impacted.

On the basis of the assessment outlined above, it is recommended that the Director General:

- (a) be satisfied that 2.4.2.1 d applies;
- (b) be satisfied that the application demonstrates that the viability of the red flag area is low;
- (c) be satisfied that the application demonstrates that the red flag area makes a low contribution to regional biodiversity values;
- (d) be satisfied that the impacts of certification on the red flag area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

3. Use of certified local data for *Rutidosia heterogama* (the Heath Wrinklewort)

Under section 3.4 of the Biodiversity Certification Assessment Methodology, the Director General may certify the use of more appropriate local data (instead of the use of the Vegetation Types Database, Vegetation Benchmarks Database and the Threatened Species Profile Database).

The Director General must be of the opinion that the local data more accurately reflects local environmental conditions and must provide reasons for this opinion.

The Threatened Species Profile Database, which informs the Biodiversity Certification tool presently lists the Heath Wrinklewort (*Rutidosia heterogama*) as a species which cannot withstand further losses with the loss of no more than five individuals considered negligible.

Appendix 7 of the Warnervale Town Centre Biodiversity Certification Assessment Report proposes the use of certified local data and provides the results of local surveys for the Heath Wrinklewort.

A population of 4,980 individual Heath Wrinklewort was identified across the Biodiversity Certification Assessment Area and wider rail corridor (Species Impact Statement, 2011, North Warnervale Station). 3,846 of these individuals will be

protected within the proposed Warnervale Daisy Reserve. The Daisy Reserve is adjacent to the area proposed for Biodiversity Certification and the daisies in the reserve form part of this local population. It should be noted that the Daisy Reserve is not included as conservation land for the Biodiversity Certification of the Town Centre as it is earmarked as an offset for a different proposal (the railway station).

There are seven distinct known populations of *Rutidosia heterogama* in the Wyong Catchment Management Authority (CMA) sub-region and 1,154 records in the Hunter/Central Rivers CMA, containing 17,904 individuals.

The 163 individuals which will be removed due to development in the proposed certification area, account for only 3.3 per cent of the local population or 0.9 per cent of the population in the Hunter/Central Rivers CMA area of operations. See "Fig. 21" and "Fig. 23" from the Biodiversity Certification Assessment Report (pp. 90 and 94) at in **Appendix 5**, which show the local and regional distribution of this species.

On the basis of the assessment outlined above, it is proposed that the Director General:

- form the opinion that the local data more accurately reflects local environmental conditions for the reasons outlined above, and
- certify the use of this local data instead of the data in the Threatened Species Profile Database.

4. Assessment of indirect impacts on biodiversity values

Section 6 of the Methodology requires the application to address to the satisfaction of the Director General how the proposed ownership, management, zoning and development controls of the land proposed for certification is intended to mitigate any indirect impacts on biodiversity values.

The Biodiversity Certification Assessment Report does not discuss how the ownership of the land may mitigate any indirect impacts on biodiversity values. A recommendation to the Minister for a minor amendment to the Biodiversity Certification Assessment Methodology has been made in section 5.3 of this report.

In relation to zoning, Environmental Protection planning zones have been allocated to the main riparian zone and to the Warnervale Daisy reserve, which is not included, but adjacent to the proposed biodiversity certification area, in order to ensure retention of significant vegetation and threatened species habitat, including *Rutidosia heterogama*. The E2 zone for the Daisy Reserve and within the riparian area is generally intended to protect land that has high conservation value. A number of land uses considered to be inappropriate for this zone have been mandated as prohibited uses in Wyong Shire Council's Local Environmental Plan.

In relation to development controls it is recommended that the Director General accepts the recommendation in the Biodiversity Certification Assessment Report to use the Wyong draft Development Control Plan 2012 (DCP) to ensure the mitigation of, and significantly reduce any indirect impacts on biodiversity values. The provisions in the DCP include guidance in respect of protecting the key hydrological characteristics of Porter's Creek Wetland and Wallarah Creek, integrating water cycle management and water sensitive urban design, the retention of riparian corridors, the retention of significant hollows and habitat trees, and soil controls.

It is recommended that the Director-General be satisfied that:

- (a) the application addresses how the proposed management, zoning and development controls of the land proposed for certification is intended to mitigate any indirect impacts on biodiversity values; and
- (b) any indirect impacts on the biodiversity values of land proposed for certification are appropriately minimised in accordance with section 6 of the methodology (as proposed to be varied by the Minister).

3 Proposed Conservation Measures

The application proposes the following conservation measures:

- (a) a Special Infrastructure Contribution (SIC) under the *Environmental Planning and Assessment Act 1979*, to be indexed in line with CPI changes over time, and
- (b) a financial contribution of \$2 million from the NSW Government to offset a discount to the SIC

In 2008, the then Minister for Planning:

- made the Special Contributions (Warnervale) Order 2008, which declared a Warnervale Town Centre Special Contributions Area; and
- determined the level and nature of development contributions for that area and directed Wyong Shire Council to impose a condition (determined in accordance with an approved Special Infrastructure Contributions Plan) on a grant of development consent in relation to the Warnervale Town Centre Contributions Area.

The approved Special Infrastructure Contributions Plan for the Warnervale Town Centre – Special Contributions Area includes a Special Infrastructure Contribution of \$4 million for the purchase of biodiversity offsets.

In June 2012, the NSW Government announced a discount of 50 per cent for State Infrastructure Contributions. In order to provide certainty to the conservation measure, a letter from the Treasurer to the Minister for the Environment (November 2012) states that the NSW Government will provide the resulting 50 per cent shortfall in the SIC contributions. This letter was placed on public exhibition with the biodiversity certification application as well as an information sheet on how the funds will be collected and how funds are to be used for the conservation measure.

Under s126L(1)(o) of the *Threatened Species Conservation Act 1995*, the Minister may determine any other measure (other than those listed under subsections (a) – (n) of that subsection) to be a conservation measure.

It is recommended that the Minister determine that under s126L of the *Threatened Species Conservation Act 1995*, the \$2 million contribution from the NSW Government is a conservation measure.

Who the funds will be paid to

If the Minister decides to confer biodiversity certification on Warnervale Town Centre:

- NSW Government will provide \$2 million; and
- the Director General of the Department of Planning and Infrastructure (in consultation with the Secretary of Treasury) will provide \$2 million (in 2008 dollar values) levied from the landowners through the SIC

to the Environmental Trust in accordance with the protocol (**Appendix 4**).

How the funds will be spent to offset biodiversity impacts

The Environmental Trust will provide grants to the Office of Environment and Heritage to expend the offset funds in accordance with the Biodiversity Certification Assessment Methodology (sections 9.3, 9.4, and 10).

- The Environmental Trust will set up a Warnervale Town Centre biodiversity offset program which will be used for the protection of key high biodiversity value lands within the region. The use of an offset program enables the achievement of strategic conservation outcomes by focussing on areas of regional conservation priority, and delivering long term conservation security.
- The Warnervale Town Centre biodiversity offset program will enable the Environmental Trust to fund land acquisition for conservation purposes, fund conservation agreements, or buy and retire BioBanking credits to offset impacts to biodiversity arising from the Warnervale Town Centre development up until the anticipated end of the land release process around 2022/23.

A Business Plan will be prepared which ensures review of the receipt and expenditure of the SIC and Treasury funds by the Environmental Trust on an annual basis. If the Minister confers biodiversity certification, payments will occur in accordance with a payment schedule which is updated prior to the commencement of each financial year. For any given financial year the expected proportion of total remaining lot production in the proposed certification area is determined, then the same proportion of the remaining planned funding that has not been previously allocated is allocated for that financial year. The payment schedule can be amended for later years if the SIC is collected at a faster or slower rate than expected.

What biodiversity will the funds purchase?

The credit calculations for Warnervale Town Centre using the biodiversity certification tool and the credit converter resulted in a requirement to offset the development of Warnervale Town Centre with 2,191 ecosystem credits and 1,756 species credits (1,754 credits for Heath Wrinklewort and 2 credits for Wallum Froglets), and estimated that this would cost just under \$4 million.

The amendments to the footprint following exhibition to include land for Nikko Road and as a consequence of public submission increased the number of ecosystem credits required to 2,233 and species credits to 2,508 (2,506 credits for Heath Wrinklewort, or about 415 – 425 individuals, and 2 credits for Wallum Froglets).

It was originally estimated that it would be necessary to purchase 236 ha of land belonging to four different vegetation types plus an additional 26 ha (236 ha x 0.90) for providing a financial contribution instead of land (262 ha in total, in accordance with the biodiversity certification calculator), in order to provide sufficient credits to achieve an improve or maintain outcome for biodiversity. This number has now been amended to 267 ha, due to the inclusion of land for Nikko Road by council as a result of submissions.

The financial contribution required to achieve this outcome is estimated to cost \$4,035,750. The \$4 million dollars will be sufficient as the SIC contribution will be indexed to 2008 dollar values. A copy of a letter from the Minister for Planning and Infrastructure to the Minister for the Environment assuring her of this indexation is at **Appendix 5**.

There are several possible mechanisms for the provision of offsets. Conservation measures include land purchase or funding conservation agreements, funding land management, and administration fees. The funds will be spent in accordance with the rules and requirements set out in section 10 of the methodology. Priorities for securing regional conservation outcomes from this process will be identified by the Office of Environment and Heritage.

It is anticipated that the majority of offsets will be provided by funding the purchase of priority conservation land for conservation in perpetuity or conservation agreements under the *National Parks and Wildlife Act 1974* and purchasing and retiring BioBanking credits. The financial contribution thus enables biodiversity to be maintained or improved as an overall outcome.

Please note that an error of calculation amounting to \$774.00 was reported during public exhibition; the total of \$4,036,524 in the original report appears to be due to a typographical error. The discrepancy constitutes less than 0.02 per cent of the total sum. It was reported that the Office of Environment and Heritage would require \$4,036,524 to pay for the required conservation measures, but now it has been revised down to \$4,035,750. The financial contributions are considered sufficient to provide credits to achieve an improve or maintain outcome for biodiversity.

4 Public notification submissions

In accordance with the requirements of section 126N of the *Threatened Species Conservation Act 1995* the biodiversity certification application was put on exhibition between 22 January 2013 and 25 February 2013. Seven submissions were received within the given timeframe. These relate to:

1. the potential need to refer the project to the Australian Government Department of the Environment (previously the Department of Sustainability, Environment, Water, Populations, and Communities), if Matters of National Environmental Significance (e.g. Koalas and *Rutidosia heterogama*, the Heath Wrinklewort) will be significantly impacted by the biodiversity certification
2. a request from the Department of Primary Industries that the offset lands do not reduce the agricultural potential of land zoned for rural purposes
3. a request for clarification of whether Nikko Road, an unformed road on the western boundary of the eastern section of the Warnervale Town Centre is included in the biodiversity certification area under assessment, and how this relates to the current development application for the site
4. the lack of consideration of the Narrabeen Dooralong Spotted Gum-Ironbark Forest (Bell, 2002) as being attributable to the Lower Hunter Spotted Gum-Ironbark Forest endangered ecological community
5. notification that an orchid, *Corunastylis* sp. Charmhaven recently listed as critically endangered was not considered in the assessment of the town centre proposal
6. a variety of matters, in particular the use of the biodiversity certification methodology and credit calculator, and
7. the treatment of riparian zones in the assessment.

Please see Table 1 below for a summary of issues raised in submissions, and the responses from Wyong Shire Council and the Office of Environment and Heritage. The original submissions can be found in **Appendix 2**. A detailed review of the submissions by the Office of Environment and Heritage can be found in **Appendix 3**.

Table 1: Summary table of response to submissions

	<u>Submissions</u>	<u>Council's response (see Appendix 5 – letter of 9 May 2013)</u>	<u>Office of Environment and Heritage's response</u>
1	<p>A letter from the Australian Government Department of the Environment (previously Sustainability, Environment, Water, Population and Communities) about the potential need to refer the project to the Department, if Matters of National Environmental Significance (e.g. Koalas and <i>Rutidosis heterogama</i>, the Heath Wrinklewort) will be significantly impacted by the biodiversity certification.</p>	<p>It is the responsibility of the proponent to consult with the Australian Government Department of the Environment (previously Sustainability, Environment, Water, Population and Communities) if they think that their proposal will impact on Matters of National Environmental Significance (MNES). Council may still pursue a Strategic Assessment under the Environment Protection and Biodiversity Conservation Act 1999, depending on budget constraints, in relation to Koala, Grey-headed Flying-fox and the Warnervale Daisy, <i>Rutidosis heterogama</i>.</p>	<p>It is the responsibility of the proponent to consult with the Australian Government Department of the Environment (previously Sustainability, Environment, Water, Population and Communities) if they think that their proposal will impact on Matters of National Environmental Significance (MNES).</p>
2	<p>A request from the Department of Primary Industries that the offset lands do not reduce the agricultural potential of land zoned for rural purposes.</p>	<p>The Office of Environment and Heritage will decide in the future where the offsets will be located.</p>	<p>This issue will be considered during the offsetting process. Offsetting will target lands with high biodiversity values.</p>
3	<p>An email from Wyong Shire Council requesting clarification of whether Nikko Road, an unformed road on the western boundary of the eastern section of the Warnervale Town Centre is included in the biodiversity certification area under assessment, and how this relates to the current development application for the site.</p>	<p>Council has amended their application to include the unformed Nikko Road. As a consequence additional credits are required, which will incur further costs for biodiversity offsets. Council has the expectation that the additional funding will be covered by an indexation of the Special Infrastructure Contributions (SIC).</p>	<p>This anomaly has been rectified with a minor amendment to the biodiversity certification application and the associated maps in the revised application. The amendment will result in an additional requirement for offsetting the vegetation along the road corridor, and also for threatened species. As the SIC will be indexed, the cost for purchasing the additional offsets will be covered.</p>
4	<p>A letter from the Community Environment Network stating that there has been a lack of consideration of the Narrabeen Dooralong</p>	<p>Council states that they have considered this matter as evidenced in Appendix 1 in the application. Their consultants did not consider</p>	<p>Since the Office of Environment and Heritage's letter was sent to Council (30 September 2011) new information has come to light in Bell's PhD thesis regarding vegetation</p>

<u>Submissions</u>	<u>Council's response (see Appendix 5 – letter of 9 May 2013)</u>	<u>Office of Environment and Heritage's response</u>
<p>Spotted Gum-Ironbark Forest (Bell, 2002) as being attributable to the Lower Hunter Spotted Gum-Ironbark Forest Endangered Ecological Community.</p>	<p>the Narrabeen Dooralong Spotted Gum-Ironbark Forest (Bell, 2002) as conforming to the description of the EEC. Council enclosed a letter from the Office of Environment and Heritage stating that the endangered ecological community is not present within the biodiversity certification area.</p>	<p>communities and whether the local Spotted Gum vegetation should be attributed to the Lower Hunter Spotted Gum endangered ecological community (EEC). A copy of the thesis is in Appendix 5. A map in the thesis (page 181) indicates which areas of the Warnervale Town Centre are considered by Bell to fit the final determination for this EEC. Of the 16 ha of Spotted Gum Ironbark vegetation on site, an estimated 6.5 ha may conform to the description of the EEC. Of this area, 4.6 ha are included in the "retained land", i.e. land which is included in the Biodiversity Certification Assessment area, but which is not proposed for biodiversity certification or as a conservation measure. This 4.6 ha are included in the "Daisy Reserve" which is intended to be used as an offset for the loss of <i>Rutidosia heterogama</i> as a consequence of the development of the Railway Station, and is being processed in a separate development application from the Town Centre. The potential Lower Hunter Spotted Gum-Ironbark Forest EEC outside this reserve, i.e. within the area proposed for biodiversity certification, is 1.9 ha. The Office of Environment and Heritage has decided to put a request to the Minister for a minor variation of the methodology, on the grounds that the amount of vegetation to be removed is small, and ask for the red flag to be varied. The area would then need to be offset according to section 10 of the Biodiversity Certification Assessment Methodology.</p>
<p>5 Notification by Wyong Shire Council that an orchid, <i>Corunastylis</i> sp. Charmhaven, recently</p>	<p>Council has subsequently conducted surveys for the <i>Corunastylis</i> orchid at the appropriate</p>	<p>Council has consulted with the Office of Environment and Heritage and revised the development footprint to avoid</p>

<u>Submissions</u>	<u>Council's response (see Appendix 5 – letter of 9 May 2013)</u>	<u>Office of Environment and Heritage's response</u>
<p>listed as critically endangered, was not considered in the assessment of the town centre proposal.</p>	<p>time of year. Orchids were found in two areas. One area is within the proposed Daisy Reserve and will not be impacted. The other area, which was previously within an area earmarked for development, has been excluded from the Biodiversity Certification application. Wyong Shire Council has consulted with the Office of Environment and Heritage and has designated a 30 m buffer around this orchid location. Town planning will accommodate the conservation needs of the orchid.</p>	<p>impacts on the orchid. Both populations of the <i>Corunastylis</i> sp. Charmhaven orchid have been excluded from the biodiversity certification assessment area.</p>
<p>6 A letter from Mr Phil Conacher relating primarily to the biodiversity certification methodology - seven separate issues mainly going to the validity of the process which include:</p> <ol style="list-style-type: none"> 1. that the conservation of <i>Rutidosia heterogama</i> in the Warnervale Daisy Reserve is not being included within the Biodiversity Certification calculations 2. that the riparian zones have not been calculated as conservation for the purposes of the biodiversity certification calculations. 3. the lack of justification for a 10 per cent additional land offset required 4. the lack of justification for management costs 5. the lack of justification for an administration fee 6. the lack of sufficient details to justify the cost 	<ol style="list-style-type: none"> 1. The Daisy Reserve is being used as an offset for the Warnervale Railway Station, which is a separate process. The loss of <i>Rutidosia heterogama</i> on the Warnervale Town Centre site will need to be offset in the future offset areas. 2. The riparian areas were not considered as conservation areas, as there will be a level of development in these areas. The methodology does not allow for partial use as conservation and partial use as development. 3. Justification for the additional 26 ha for the future offset area is "based on the consultant's experience". 4. The 9 per cent cost contingency for land management is based on the "experience of the consultant". 5. The 10 per cent administration fee is 	<p>The Office of Environment and Heritage agrees with Council's response to issue 1, 2 and 6. Some of the Office of Environment and Heritage's responses to Mr Conacher's seven submission matters (issues 3, 4, 5) differ from Council's. These questions relate to the methodology which is made under the <i>Threatened Species Conservation Act 1995</i>.</p> <p>7. Council's calculations have been found to be inaccurate. The amount which is required to offset the additional areas is actually less than the amount reported in the Assessment Report. For this reason the mistake will not impact on the Office of Environment and Heritage's ability to deliver the offsets.</p>

<u>Submissions</u>	<u>Council's response (see Appendix 5 – letter of 9 May 2013)</u>	<u>Office of Environment and Heritage's response</u>
<p>of the offsets</p> <p>7. that the costs of the offsets are incorrectly calculated.</p>	<p>considered reasonable from the experience of the consultant.</p> <p>6. The location of the offset lands is yet to be determined. However, the consultants provided justification of the estimated cost for purchasing offset lands. As an alternative to land purchase, the Environmental Trust, which will administer the funding, has the option of financing BioBanking sites or conservation agreements with the financial contributions.</p> <p>It is the Office of Environment and Heritage's responsibility to purchase sufficient offsets with the funds available.</p> <p>7. There was no response to this point in Council's reply to submissions.</p>	
<p>7 A second letter from Mr Phil Conacher stating that the report indicates that one of the creeklines should be retained and buffered whereas the development control plan allows for removal of the creek.</p>	<p>The riparian zone featured in Figure 11 of the report does not alter the development outcome, but impacts on the calculation of credits in the BCAM methodology. It is not inconsistent with Wyong Council's Development Control Plan.</p>	<p>The Office of Environment and Heritage agrees with Council's response.</p>

5 Recommendations

5.1 Documents that are pertinent for the Minister and/or Director General to review prior to making a decision are:

1. Biodiversity certification application (15 January 2013) and amended application (9 May 2013)
2. Warnervale Town Centre Biodiversity Certification Strategy FINAL (21 March 2012)
3. Biodiversity Certification Assessment Report for the Warnervale Town Centre FINAL (21 March 2012)
4. Ministerial determination relating to "Development Contributions for the Warnervale Town Centre" (30 October 2008)
5. Special Contributions Area (Warnervale) Order 2008 (14 November 2008)
6. Public submissions including letters from the Australian Government Department of the Environment (previously Sustainability, Environment, Water, Population and Communities), the NSW Department of Primary Industries, Wyong Shire Council (two), the Community Environment Network Inc, and Mr Phil Conacher (two) (**Appendix 2**)
7. Warnervale Town Centre – Special Infrastructure Contributions Plan (October 2008)
8. Direction under s94 EF of the Act – Special Contributions Area Warnervale Town Centre – Letter to Wyong Shire Council (30 October 2008)
9. Letter from the NSW Environmental Trust giving in-principle agreement to administering the Special Infrastructure Contribution funds arising from the Warnervale Town Centre Biodiversity Offset Program (4 April 2012)
10. Media release: NSW Government extends development (SIC) levy discount (28 June 2012)
11. Letter from the Office of Environment and Heritage to Wyong Shire Council regarding documents to be publicly exhibited as part of Warnervale Town Centre Biocertification Application (16 November 2012)
 - iv. Information sheet on Special Infrastructure Contributions for proposed Warnervale Town Centre Biodiversity Certification – Attachment 1
 - v. Fact Sheet outlining the principles for the expenditure by the Office of Environment and Heritage of the financial contributions and levy funds (16 November 2012) – Attachment 2
 - vi. Letter from the Treasurer confirming Government's commitment to a financial contribution for Warnervale Town Centre and giving in-principle support to the indexing of contributions (15 November 2012) – Attachment 3
12. Draft comprehensive (Standard Instrument) LEP 2012 (Wyong Shire Council)
13. Wyong Local Environmental Plan 1991 – Warnervale Town Centre – Land Reservation Acquisition Map (12 October 2011)
14. Bell, S. J. The natural vegetation of the Wyong Local Government Area, Central Coast, New South Wales. Vegetation Community Profiles and Maps. (December 2002)
15. Final determination of "Lower Hunter Spotted Gum Ironbark Forest in the Sydney Basin Bioregion" (2005/2010) by the NSW Scientific Committee established under the *Threatened Species Conservation Act 1995*
16. Bell, S. J. Lower Hunter Spotted Gum Ironbark Forest EEC in the Warnervale Area, Wyong Shire (29 September 2010)

17. Turner, K. (7 November 2011) "A brief independent review of whether vegetation on lands in the Warnervale area substantially conform with the final determination of the Lower Hunter Spotted Gum-Ironbark Forest EEC"
18. Letter from the Office of Environment and Heritage to Wyong Shire Council regarding Lower Hunter Spotted Gum Ironbark Forest in Warnervale Town Centre (30 September 2011)
19. Bell, S.A.J. (February 2013) "Defining and mapping rare vegetation communities: improving techniques to assist land-use planning and conservation". Thesis submitted for the degree of Doctor of Philosophy, University of Newcastle
20. Letter from the Office of Environment and Heritage to Wyong Shire Council re the *Corunastylis* sp. Charmhaven orchid at Warnervale Town Centre (20 April 2013)
21. Biodiversity Certification Assessment Methodology (DECCW February 2011)
22. Draft Plan of Management – Warnervale Heath Wrinklewort Reserve (prepared for RailCorp by ecological Australia, June 2009)
23. Area Map of North Warnervale Train Station (from Species Impact Statement, 26 June 2007)

5.2 Recommendations for the delegate of the Director General

Recommendation 1

It is recommended that, under section 2.4 of the methodology, the delegate of the Director General:

- (a) be satisfied that that the feasibility of options to avoid impacts on the red flag area of 0.1 ha of *Swamp Sclerophyll Forests on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* were considered in the application for biodiversity certification; and
- (b) be satisfied that the current or future uses of land surrounding the red flag area where biodiversity certification is to be conferred reduce its viability or make it unviable (2.4.2.1 a) and that the size and connectedness of the vegetation in the red flag area where biodiversity certification is to be conferred to other native vegetation is insufficient to maintain its viability (2.4.2.1 b);
- (c) be satisfied that the application demonstrates that the viability of the red flag area is low;
- (d) be satisfied that the application demonstrates that the red flag area of 0.1 ha of *Swamp Sclerophyll Forests on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* makes a low contribution to regional biodiversity values;
- (e) having considered the criteria in section 2.4 of the Methodology, be satisfied of, and decide, that the impacts of certification on the red flag area of 0.1 ha of *Swamp Sclerophyll Forest on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* may be offset in accordance with the rules and requirements in section 10 of the Methodology.

Recommendation 2

It is recommended that, under section 2.4.2 of the methodology, the delegate of the Director General:

- (a) be satisfied that the area of a vegetation type in a red flag area on land where biodiversity certification is conferred, being the 1.9 ha area of candidate Lower Hunter Spotted Gum Ironbark Forest, is minor relative to the area containing that vegetation type on land subject to proposed conservation measures (2.4.2.1 d). The conservation measures proposed in this application provide for the purchase of land for conservation and their management, or the purchase of conservation agreements or the funding of BioBanking agreements. The funds will be coordinated by the Environmental Trust and conservation measures will be purchased in accordance with the methodology. The Business Plan prepared for the Environmental Trust will include a requirement to use the funds for the conservation of this vegetation type if possible. The quantity of this endangered ecological community remaining in the region (see below) indicates that it is likely that the Office of Environment and Heritage will be able to offset those biodiversity values which will be impacted by the biodiversity certification.
- (b) be satisfied that the application demonstrates that the viability of this red flag area is low.
- (c) be satisfied that the application demonstrates that the candidate Lower Hunter Spotted Gum Ironbark Forest red flag area makes a low contribution to regional biodiversity values. It has been calculated that there is 695 ha of candidate Lower Hunter Spotted Gum Ironbark Forest within Wyong Shire Council and 26,518 ha of Lower Hunter Spotted Gum Ironbark Forest in the Lower Hunter region, and 1.9 ha is a small amount in this context.
- (d) having considered the criteria in section 2.4.2 of the methodology, be satisfied that the impacts of certification on the 1.9 ha red flag area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.

Recommendation 3

In relation to *Rutidosis heterogama* (the Heath Wrinklewort), it is recommended that the delegate of the Director General:

- (a) forms the opinion that the local data presented in Appendix 7 of the Biodiversity Certification Assessment Report, and explained on pages 14 and 15 of this report, instead of data in the Threatened Species Profile Database more accurately reflects local environmental conditions, in accordance with section 3.4 of the Methodology for the following reasons:
 - The local area has been closely surveyed for Heath Wrinklewort and indicates that the local population of this species could number 4,980 individuals. The loss of 163 individuals in the biocertification area amounts to 3.3 per cent of the local population. This is considered a relatively small number of individuals impacted compared to the number of individuals within the local area.
 - Council is committing to the management of approximately 3,846 individuals within the proposed Daisy Reserve and is expecting an increase in numbers within the reserve caused by management measures.

The main source of data is the Plan of Management – Draft Warnervale Heath Wrinklewort Reserve (2009) prepared by EcoLogical Australia in 2011.

- (b) certifies the use of this local data instead of the data in the Threatened Species Profile Database.

Recommendation 4

It is recommended that the delegate of the Director General be satisfied, having considered Council's evaluation of the criteria in section 6 of the methodology, that:

- (a) the application addresses how the proposed management, zoning and development controls of the land proposed for biodiversity certification is intended to mitigate any indirect impacts on biodiversity values; and
- (b) any indirect impacts on the biodiversity values of land proposed for biodiversity certification are appropriately minimised in accordance with section 6 of the methodology (as proposed to be varied by the Minister).

5.3 Recommendations for the Minister

Recommendation 1

It is proposed to vary the methodology by deleting of the following text from page 57 of the methodology:

“The arrangements for making a financial contribution, as identified in accordance with this section, will need to be secured in a Biodiversity Certification Agreement. In particular, the Biodiversity Certification Agreement will need to ensure that:

- *all relevant parties are party to the Biodiversity Certification Agreement, for example, the relevant third party where the financial contribution is to be paid to a third party to secure the offset sites*
- *the financial contribution is only applied towards conservation measures which will generate credits which meet the requirements of the offset rules in section 10 of the methodology.”*

It is recommended that the Minister:

- (a) form the opinion that:

- this variation to the methodology is minor, and
- this variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary; and

- (b) permit this variation to the methodology under s126Q of the *Threatened Species Conservation Act 1995* to enable the financial contributions from the NSW Government to be provided without a biodiversity certification agreement for the following reasons:

- the Treasurer confirmed on 15 November 2012 Government's commitment to a financial contribution for Warnervale Town Centre in a letter to the Office of Environment and Heritage.
- the Allocation Protocol provided by the Office of Environment and Heritage and the Department of Planning and Infrastructure has agreed to transferring \$2,000,000 to the Environmental Trust for offsetting the impacts on biodiversity of the development of Warnervale Town Centre.
- the Environmental Trust will be directed through a Business Plan which ensures that the funds will be used for the purchase of conservation measures in accordance with the methodology, and thus will contribute to the achievement of an improve or maintain outcome.

Recommendation 2

Under s126L(1)(o) of the *Threatened Species Conservation Act 1995*, the Minister may determine any other measure (other than those listed under subsections (a) – (n) of that section) to be a conservation measure.

It is recommended that the Minister determine that under s126L of the *Threatened Species Conservation Act 1995* the \$2 million contribution from the NSW Government is a conservation measure.

Recommendation 3

It is proposed to vary the methodology by deleting of the following text from page 8 of the methodology:

"2.4.1 Feasibility of options to avoid impacts on red flag area(s) where biodiversity certification is conferred

The Director General must be satisfied that the feasibility of options to avoid impacts on red flag areas has been considered in the application for biodiversity certification. An application for biodiversity certification can address this requirement by demonstrating that:

a) all reasonable measures have been taken to avoid adverse impacts on the red flag areas and to reduce impacts of development on vegetation remaining within the biodiversity certification area
b) appropriate conservation management arrangements cannot be established over the red flag area given its current ownership, status under a regional plan and zoning and the likely costs of future management. In addressing the criteria for a), the application for biodiversity certification may include information that demonstrates:

- *how the subdivision design, (including the configuration of lots, minimum lot sizes and/or options for lot averaging and lot clustering) have been used to avoid and minimise impacts on red flag areas*
- *how the spatial distribution, configuration, size of patches and connectedness of the red flag areas proposed for conservation measures within the biodiversity certification assessment area have minimised the overall impacts of conferring biodiversity certification on the red flag areas".*

It is recommended that the Minister:

(a) form the opinion that:

- this variation to the methodology is minor, and
- this variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary; and

(b) permit this variation under s126Q of the *Threatened Species Conservation Act 1995* to enable a red flag variation under section 2.4 of the Methodology for the following reasons:

- Wyong Shire Council did not have access to the comprehensive analysis provided by Bell in his thesis finalised in 2013 when the application was made, and it would be unreasonable to expect Wyong Shire Council to revise its application
- the Office of Environment and Heritage's assessment of the subsequent criteria (2.4.2) indicates that the viability of the red flag area is low or not viable according to criteria 2.4.2.1 d, because "the area of a vegetation type in a red flag area on land where biodiversity certification is conferred is minor relative to the area containing that vegetation type on land subject to proposed conservation measures" and that the contribution of the 1.9 ha red flag area to regional biodiversity values is low. Evidence for this position is as follows:
 - according to recent research presented in Bell's PhD and his previous mapping of vegetation communities it is shown that 1.9 ha is 0.27 per cent of the remaining estimated 695 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest in Wyong Shire Council. 1.9 ha is an insignificant amount of vegetation within this context, and
 - the modelled distribution of this endangered ecological community is estimated at 26,518 ha (Eco Logical Australia 2003) and 4,000 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest is in current reservation in the Lower Hunter region. 1.9 ha is an insignificant amount of vegetation within this wider context, and
 - the 1.9 ha will be offset according to the offset rules stipulated in section 10 of the methodology. The amount of extant Lower Hunter Spotted Gum – Ironbark Forest vegetation (26,518 ha) indicates that it is likely that the acquisition or protection of lands suitable for conservation of this vegetation type will benefit this vegetation community as an outcome of the conservation measures resulting from Biodiversity Certification.

Recommendation 4

It is proposed to vary the methodology by deleting "ownership," from page 37 of the methodology.

An assessment of how the matter of ownership will mitigate any indirect impacts on biodiversity values was not carried out in the application. However, the Office of Environment and Heritage is of the opinion that Wyong Shire Council has taken responsibility through the Council's Development Control Plan for the mitigation of indirect impacts. Each developer within the biodiversity certification area will have to adhere to the objectives relating to the minimising of indirect impacts, ensuring that the objectives are achieved.

It is recommended that the Minister:

(a) form the opinion that:

- this variation to the methodology is minor, and
- the variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary.

(b) permit this minor variation to the Biodiversity Certification Assessment Methodology, to remove the requirement to address how the proposed ownership of the land proposed for biodiversity certification will mitigate any indirect impacts on biodiversity values, for the following reasons:

- Wyong Shire Council has taken responsibility through the Council's Development Control Plan for the mitigation of indirect impacts.

Recommendation 5

Under Section 126N of the Threatened Species Conservation Act 1995 the Minister may require further public notification of the application, as varied. It is recommended, however, that the Minister determine not to direct that further public notification of the application, as varied by council following public consultation be carried out. The Office of Environment and Heritage considers that adequate consultation has been carried out. Public submissions were reviewed and changes have been made to the application in response to the submissions.

Recommendation 6

It is recommended that the Minister:

(a) determines under s126P of the *Threatened Species Conservation Act 1995*, on the basis of the biodiversity certification assessment undertaken in accordance with the methodology as varied by the Minister, that the overall effect of the biodiversity certification of Warnervale Town Centre is to improve or maintain biodiversity values;

Recommendation 7

It is recommended that the Minister:

(a) confers under s126H of the *Threatened Species Conservation Act 1995* biodiversity certification on the Warnervale Town Centre identified as "biodiversity certified land" in the biodiversity certification order (**Attachment B**) by signing and dating that order.

Recommending officer: Monica Collins, Director North Branch (0419 402 645).

6 Decisions

6.1 Decisions for the delegate of the Director General

The delegate of the Director General should carefully consider these matters and only sign in the designated places if he or she agrees with those decisions. The delegate may change, or add to, the wording of the decision.

Decision 1

I, Terry Bailey, Acting Chief Executive of the Office of Environment and Heritage, as delegate of the Director General of the Department of Premier and Cabinet, under section 2.4 of the methodology:

- a) am satisfied that that the feasibility of options to avoid impacts on the red flag area of 0.1 ha of *Swamp Sclerophyll Forests on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* were considered in the application for biodiversity certification; and
- b) am satisfied that the current or future uses of land surrounding the red flag area where biodiversity certification is to be conferred reduce its viability or make it unviable (2.4.2.1 a) and that the size and connectedness of the vegetation in the red flag area where biodiversity certification is to be conferred to other native vegetation is insufficient to maintain its viability (2.4.2.1 b);
- c) am satisfied that the application demonstrates that the viability of the red flag area is low;
- d) am satisfied that the application demonstrates that the red flag area of 0.1 ha of *Swamp Sclerophyll Forests on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* makes a low contribution to regional biodiversity values;
- e) having considered the criteria in section 2.4 of the Methodology, am satisfied of, and decide, that the impacts of certification on the red flag area of 0.1 ha of *Swamp Sclerophyll Forest on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions* may be offset in accordance with the rules and requirements in section 10 of the Methodology.



Terry Bailey

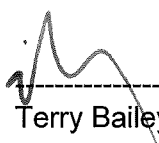
22 January 2014.

Date

Decision 2

I, Terry Bailey, Acting Chief Executive of the Office of Environment and Heritage, as delegate of the Director General of the Department of Premier and Cabinet, under section 2.4 of the methodology:

- a) am satisfied that the area of a vegetation type in a red flag area on land where biodiversity certification is conferred, being the 1.9 ha area of candidate Lower Hunter Spotted Gum Ironbark Forest, is minor relative to the area containing that vegetation type on land subject to proposed conservation measures (2.4.2.1 d). The conservation measures proposed in this application provide for the purchase of land for conservation and their management, or the purchase of conservation agreements or the funding of BioBanking agreements. The funds will be coordinated by the Environmental Trust and conservation measures will be purchased in accordance with the methodology. The Business Plan prepared for the Environmental Trust will include a requirement to use the funds for the conservation of this vegetation type if possible. The quantity of this endangered ecological community remaining in the region (see below) indicates that it is likely that the Office of Environment and Heritage will be able to offset those biodiversity values which will be impacted by the biodiversity certification.
- b) am satisfied that the application demonstrates that the viability of this red flag area is low.
- c) am satisfied that the application demonstrates that the candidate Lower Hunter Spotted Gum Ironbark Forest red flag area makes a low contribution to regional biodiversity values. It has been calculated that there is 695 ha of candidate Lower Hunter Spotted Gum Ironbark Forest within Wyong Shire Council and 26,518 ha of Lower Hunter Spotted Gum Ironbark Forest in the Lower Hunter region, and 1.9 ha is a small amount in this context.
- d) having considered the criteria in section 2.4.2 of the methodology, am satisfied that the impacts of certification on the 1.9 ha red flag area may be offset in accordance with the rules and requirements set out in section 10 of the methodology.



Terry Bailey

22 January 2014

Date

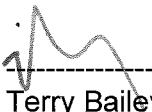
Decision 3

In relation to *Rutidosia heterogama* (the Heath Wrinklewort), I, Terry Bailey, Acting Chief Executive of the Office of Environment and Heritage, as delegate of the Director General of the Department of Premier and Cabinet:

- (a) form the opinion that the local data presented in the Biodiversity Certification Assessment Report (Appendix 7), and explained on pages 14 and 15 of this report, (instead of data in the Threatened Species Profile Database) more accurately reflects local environmental conditions, in accordance with section 3.4 of the Methodology for the following reasons:
- The local area has been closely surveyed for Heath Wrinklewort and indicates that the local population of this species could number 4,980 individuals. The loss of 163 individuals in the biocertification area amounts to 3.3 per cent of the local population. This is considered a relatively small number of individuals impacted compared to the number of individuals within the local area.
 - Council is committing to the management of approximately 3,846 individuals within the proposed Daisy Reserve and is expecting an increase in numbers within the reserve caused by management measures.

The main source of data is the Plan of Management – Draft Warnervale Heath Wrinklewort Reserve (2009) prepared by EcoLogical Australia in 2011.

- (b) certify the use of this local data instead of the data in the Threatened Species Profile Database.



Terry Bailey

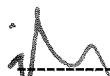
22 January 2014

Date

Decision 4

I, Terry Bailey, Acting Chief Executive of the Office of Environment and Heritage, as delegate of the Director General of the Department of Premier and Cabinet, having considered Council's evaluation of the criteria in section 6 of the methodology am satisfied that:

- a) the application addresses how the proposed management, zoning and development controls of the land proposed for biodiversity certification is intended to mitigate any indirect impacts on biodiversity values; and
- b) Any indirect impacts on the biodiversity values of land proposed for biodiversity certification are appropriately minimised in accordance with section 6 of the methodology (as proposed to be varied by the Minister).



Terry Bailey

22 January 2014

Date

6.2 Decisions for the Minister

The Minister should carefully consider these matters and only sign in the designated places if she agrees with those decisions. The Minister may change, or add to, the wording of the decision.

Decision 1

I, Robyn Parker, Minister for the Environment:

- (a) form the opinion that:
- the variation to the methodology set out in Recommendation 1 for the Minister is minor, and
 - that variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
 - strict adherence to the methodology is in this particular case unreasonable and unnecessary; and
- (b) permit that variation to the methodology under s126Q of the *Threatened Species Conservation Act 1995* to enable the financial contributions from the NSW Government to be provided without a biodiversity certification agreement for the following reasons:
- the Treasurer confirmed on the 15 November 2012 Government's commitment to a financial contribution for Warnervale Town Centre in a letter to the Office of Environment and Heritage.
 - the Allocation Protocol provided by the Office of Environment and Heritage and the Department of Planning and Infrastructure has agreed to transferring \$2,000,000 to the Environmental Trust for offsetting the impacts on biodiversity of the development of Warnervale Town Centre.
 - the Environmental Trust will be directed through a Business Plan which ensures that the funds will be used for the purchase of conservation measures in accordance with the methodology, and thus will contribute to the achievement of an improve or maintain outcome.




Robyn Parker MP

30/1/14


Date

Decision 2

I, Robyn Parker, Minister for the Environment, determine that under s126L of the *Threatened Species Conservation Act 1995* the \$2 million contribution from the NSW Government is a conservation measure.



Robyn Parker MP



Date

Decision 3


I, Robyn Parker, Minister for the Environment:

(a) form the opinion that:

- the variation to the methodology set out in Recommendation 3 for the Minister is minor, and
- that variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary; and

(b) permit that variation under s126Q of the *Threatened Species Conservation Act 1995* to enable a red flag variation under section 2.4 of the Methodology for the following reasons:

- Wyong Shire Council did not have access to the comprehensive analysis provided by Bell in his thesis finalised in 2013 when the application was made, and it would be unreasonable to expect Wyong Shire Council to revise its application
- the Office of Environment and Heritage's assessment of the subsequent criteria (2.4.2) indicates that the viability of the red flag area is low or not viable according to criteria 2.4.2.1 d, because "the area of a vegetation type in a red flag area on land where biodiversity certification is conferred is minor relative to the area containing that vegetation type on land subject to proposed conservation measures" and that the contribution of the 1.9 ha red flag area to regional biodiversity values is low. Evidence for this position is as follows:
 - according to recent research presented in Bell's PhD and his previous mapping of vegetation communities it is shown that 1.9 ha is 0.27 per cent of the remaining estimated 695 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest in Wyong Shire Council. 1.9 ha is an insignificant amount of vegetation within this context, and
 - the modelled distribution of this endangered ecological community is estimated at 26,518 ha (Eco Logical Australia 2003) and 4,000 ha of Bell's 'candidate' Lower Hunter Spotted Gum – Ironbark Forest is in current reservation in the Lower Hunter region. 1.9 ha is an insignificant amount of vegetation within this wider context, and
 - the 1.9 ha will be offset according to the offset rules stipulated in section 10 of the methodology. The amount of extant Lower Hunter Spotted Gum – Ironbark Forest vegetation (26,518 ha) indicates that it is likely that the acquisition or protection of lands suitable for conservation of this vegetation type will benefit this vegetation community as an outcome of the conservation measures resulting from Biodiversity Certification.



Robyn Parker MP

30/1/2014
Date

Decision 4

I, Robyn Parker, Minister for the Environment,

(c) form the opinion that:


- the variation to the methodology set out in Recommendation 4 for the Minister is minor, and
- that variation would result in a determination that the overall effect of biodiversity certification is to improve or maintain biodiversity values, and
- strict adherence to the methodology is in this particular case unreasonable and unnecessary.

(d) permit that minor variation to the Biodiversity Certification Assessment Methodology, to remove the requirement to address how the proposed ownership of the land proposed for biodiversity certification will mitigate any indirect impacts on biodiversity values, for the following reasons:

- Wyong Shire Council has taken responsibility through the Council's Development Control Plan for the mitigation of indirect impacts.



Robyn Parker MP




Date

Decision 5

I, Robyn Parker, Minister for the Environment, determine not to direct that further public notification of the application, as varied by council following public consultation, be carried out.



Robyn Parker MP



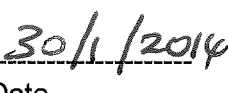
Date

Decision 6

I, Robyn Parker, Minister for the Environment, determine under s126P of the *Threatened Species Conservation Act 1995*, on the basis of the biodiversity certification assessment undertaken in accordance with the methodology as varied by me, that the overall effect of the biodiversity certification of Warnervale Town Centre is to improve or maintain biodiversity values.



Robyn Parker MP



Date

Decision 7

I, Robyn Parker, Minister for the Environment, under s126H of the *Threatened Species Conservation Act 1995*, confer biodiversity certification on the Warnervale Town Centre identified as "biodiversity certified land" in the biodiversity certification order (**Attachment B**) by **signing and dating** that order.



Robyn Parker MP



Date