

APPLICATION OF THE BIODIVERSITY CERTIFICATION ASSESSMENT METHODOLOGY...AND THEN WHAT?

Strategic assessment in coastal NSW – a Broulee case study

Project background, Broulee

When Government surveyors gazetted the seaside village of Broulee in 1837, they would never have foreseen that 170 years on, the ancient dunal systems that nestled the settlement, and the abundant flora and fauna of this unique coastal environment would be subject of one of the State's first Biodiversity Certification applications.

The Broulee Biodiversity Certification project has been developed as a strategic solution to ongoing planning, development and biodiversity issues in the Broulee area. The approach proposes to resolve long standing land use conflict and development uncertainty being experienced in the remaining undeveloped urban area of Broulee village and concerning the re-development of Moruya Airport – a facility of regional significance.

Through a streamlined development assessment pathway, Biodiversity Certification provides the opportunity to replace site-by-site, development-by-development assessment of threatened species with a landscape-wide strategic assessment (Office of Environment and Heritage 2013). Using the Biocertification pathway it is proposed to deliver better environmental outcomes from anticipated urban development, at lower cost by considering biodiversity issues up-front. This approach enables practical decision-making and recognizes the importance of opting for a cost-effective coordinated method to offset the impacts of development.

This paper describes Eurobodalla Shire Councils experience in applying the Biodiversity Certification Methodology (the Methodology), and explores the considerations for planning authorities beyond credit calculations, focusing on the operational realities that appear to be poorly understood by users, regulators and the community.

Planning context

While residential occupations are expected to increase in Broulee, and commercial opportunities associated with a larger airport facility are anticipated, a range of environmental constraints and threatened entities are present and must be considered in the planning process. These include potential presence of some 36 threatened species, an impressive density of high conservation value habitat features and significant cover of the Endangered Ecological Community (EEC), Bangalay Sand Forest (Eurobodalla Shire Council 2013)

The conservation and management of these high conservation value features poses significant challenges in light of the present zoning and development pattern, (Eurobodalla Shire Council 2012). Continuing decline due to incremental clearing for residential subdivision, developments and the ongoing impacts of occupation have the potential to further reduce the extent, condition and ecological function of remnant habitat.

However, the existence of urban zoned land at Broulee, (described in the current Eurobodalla LEP 2012 and previous Eurobodalla Urban Local Environmental Plan 1999), predating the gazettal of Bangalay Sand Forest EEC (2005) and the *Threatened Species Conservation Act 1995* (the Act), creates a legitimate expectation of development opportunity, and, in fact, impelled a level of private and public investment in planning and infrastructure over the last decade.

Following ongoing concerns and petitions for intervention communicated by local landholders and developers together with advice received from the Department of Environment and Climate Change that, 'continued cumulative clearing of remnant Bangalay Sand Forest in the Broulee area is not acceptable and a more strategic approach to development is required as a matter of urgency' (September 2009), Council, in 2010, resolved to undertake Biocertification investigations in Broulee. In early 2011, financial support for the proposal was offered by the Department of Planning and Infrastructure and the Office of Environment and Heritage (OEH) and the Project commenced.

A Project Brief was developed and expressions of interest sought for the provision of professional services to undertake Biodiversity Certification investigations in Broulee with Ecological Australia appointed to undertake the assessment.

The Broulee Biodiversity Certification proposal presents a unique scenario, whereby Council is all of; an applicant, a developer and provider of a publicly owned offset.

The Assessment Area

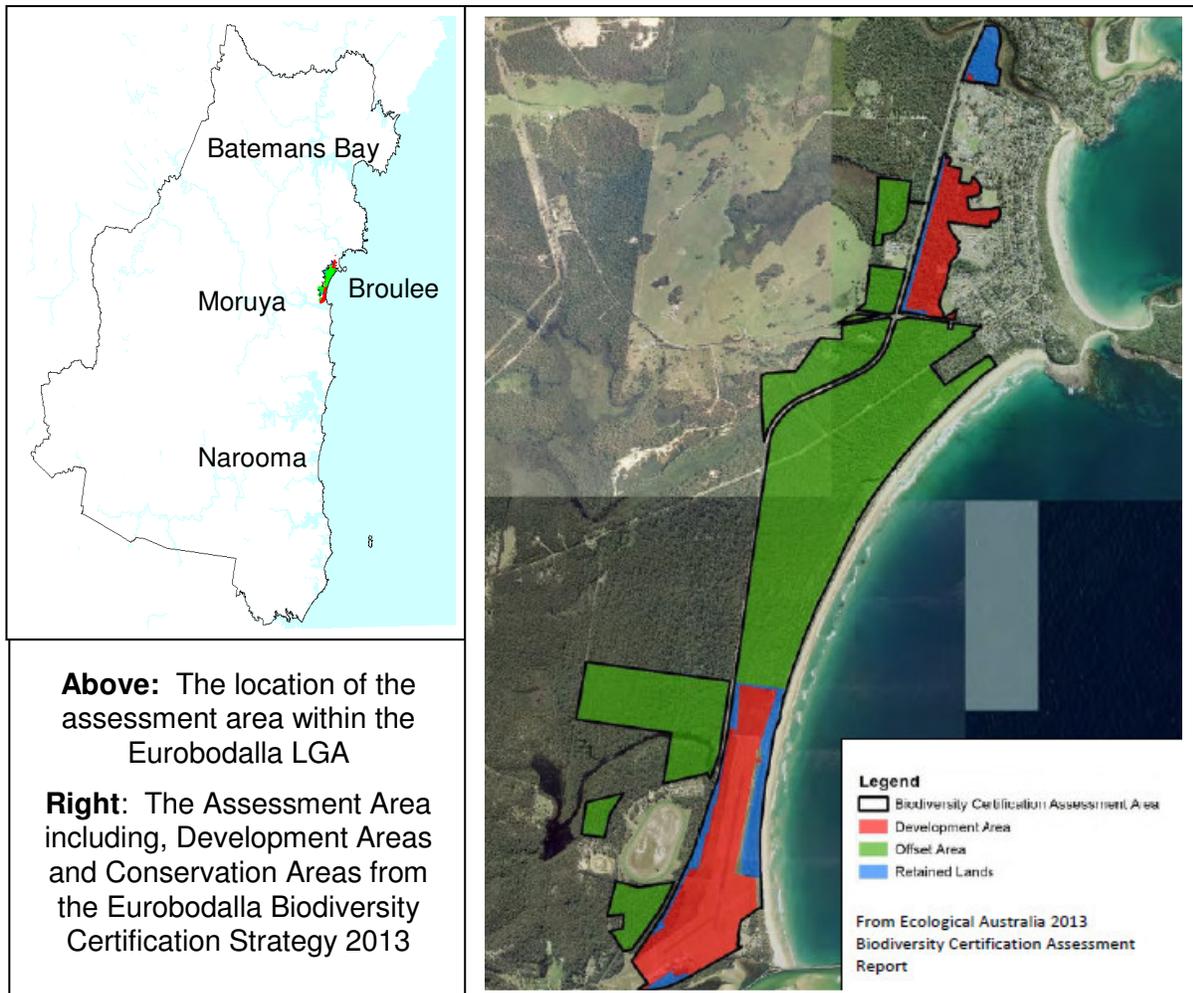
The Assessment area is located on the NSW South Coast, in the central portion of the Eurobodalla Local Government Area (LGA). It is bounded by the coast in the east, Moruya River in the south, Tomaga River in the north and comprises 589Ha of mainly vegetated land in both public and private tenure. The Assessment Area comprises the Development Areas, the Conservation Areas and other Retained Lands (see figure below)

The Development Areas were known and well defined at the commencement of the Project being; the existing (undeveloped) residential zoned land in the case of Broulee (36Ha) and the development footprint of the endorsed Moruya Airport Concept Plan 2006 (100Ha, 33Ha of which is vegetated). The total combined clearing of native vegetation within these development areas is 69Ha.

Possible Conservation Areas were identified through a desktop assessment process but were only finalized once field assessments confirmed their suitability and credit generating potential during 2012. There are 8 conservation areas that collectively contribute to offsetting the impacts of certification totaling 406.9Ha and all are public lands owned and managed by Eurobodalla Shire Council. The parcels range in size from 7 -187Ha and are principally the same vegetation type as that of the Development Area.

Retained areas are defined tracts of land adjacent to the Development Areas that do not directly influence the Biodiversity Certification assessment or contribute credit but have been identified as they may be affected by indirect impacts in the event that Biodiversity Certification is conferred.

Details of the Assessment can be accessed at the Project webpage at www.eurocoast.nsw.gov.au



The Assessment Methodology

A central element to Biodiversity Certification is the establishment of the Biodiversity Certification Assessment Methodology 2011 (the Methodology) under section 126S of the *TSC Act*.

The Methodology prescribes the manner in which a planning authority must undertake an assessment and sets out a rule set that ensures biodiversity values are improved or maintained as a result of conferring Certification over a Development Area.

Under the current Methodology (gazetted in 2011), there are 3 LGAs in NSW that have substantially commenced Biodiversity Certification processes; West Dapto (preliminary stages), Wyong and Eurobodalla (exhibited). Wagga and Albury have Biocertified Plans under savings provisions (applications made under previous Methodology).

Council has prepared an initial credit assessment consistent with the gazetted Methodology and has identified several publicly owned parcels, of over 400Ha in area, capable of offsetting anticipated biodiversity losses on land subject of the Certification application.

This discussion paper focuses on the Council's exhibited Strategy and aspects of recent experience in applying the Methodology. The broader range of technical concerns with the Method will not be discussed herein.

Challenges

Variations

In the course of preparing the Strategy and application it became apparent that several minor variations or departures from the Methodology would be required in order to meet the improve or maintain standard, (provided for under section 126Q of the *Act*)

These related to direct impacts on biodiversity values of 2 Red Flag entities; Bangalay Sand Forest and the White Footed Dunnart, and a third in relation to credit generating potential of portions of the proposed offset voluntarily conserved via a conservation Property Vegetation Plan (cPVP) in March 2008, which would otherwise be subject to credit discounting on account of existing conservation obligations, (discussed below).

For red flags, a series of criteria must be addressed to justify a variation claim and demonstrate that the impacts of Certification on the red flag areas can be offset in accordance with the Methodology. It must be established that all reasonable measures have been taken to avoid impacts on Red Flag Areas; that appropriate conservation management arrangements cannot be established over Red Flag Areas given current ownership, status under a regional plan, zoning and likely costs of future management. Arguments surrounding viability, including current or future uses of lands surrounding the red flag, condition, relative abundance and size of impacted area relative to conserved can be put in support of the position. In the case of the minor variation to existing obligation rules, Council is required to demonstrate that the improve or maintain standard can be achieved via the subject variation and that strict adherence to the Methodology is in the circumstances unreasonable and unnecessary.

The standards that have to be met under the current Methodology to justify a departure from 'red flag' protections are presently unknown and have yet to be formally tested. Informally, in preparing the subject application, Council necessarily entered into correspondence with the OEH seeking feedback on justifications proposed which were subsequently detailed in the exhibited Strategy. While the response was positive it was also very non-committal and herein lies one of many curiosities with the Biodiversity Certification process that applicants must work around.

Any variation request must be made as part of the Strategy and formal application for Certification. This essentially means that the whole process must be run and calculations undertaken based on an assumption that the red flag variations will be accepted.

In other words, the applicant must make a decision to invest significant resource to proceed without the surety of the proposed variation actually being achievable. In this case, the outcome of the described variations expressively influence the entire proposal - a failure to satisfactorily justify to the Minister that such a variation is warranted would essentially end the Project. An earlier point of determination on variations is required.

It appears that there is no additional benchmark to be met in terms of credit required for impacting HCV or red flag assets over other non-red flag vegetation or threatened species.

Additionality

A significant proportion of the public lands proposed as offsets to future development area impacts are community land or otherwise subject to existing management obligations. The Methodology sets out 'additionality' rules to apply a discounting regime to any credit that may be generated from such lands.

Formal advice was sought from the OEH on the degree of discounting that should be applied in consideration of the required activities or management commitments established by Councils Plan of Management: Natural Areas and Undeveloped Reserves (Eurobodalla Shire Council 1997), which applies to some of the proposed offset parcels. A figure of 10% was determined to be appropriate under the circumstances, reducing the effective credit yield of the applicable offset areas.

Further, and in regard to land voluntarily committed to a cPVP in 2008, a variation has been sought (described above) to enable a greater capacity to generate the required number of credits from available offset lands. Without this variation, a 55% discount would apply to the subject parcels under additionality rules, as a result of existing obligations created by the cPVP, and otherwise render the proposal unviable.

The minor variation requested, would, by treating the cPVP as a new conservation measure, allow for the existing obligations of the cPVP to be waived, in this case due to;

- the circumstances leading to its voluntary application; and
- the fact that it was in place well before gazettal of the Methodology; and
- that it currently does not meet the standards required by the Methodology for a conservation measure as it is not presently registered on title

White Footed Dunnart

In accordance with the Biodiversity Certification Assessment Methodology 2011, targeted surveys were undertaken for 7 species credit fauna species in the Broulee Development Area. One of these species, the White Footed Dunnart *Sminthopsis leucopus* was detected via pitfall trapping in March 2012 in bushland adjacent to residential Broulee. The Threatened Species Profile Database (2012) identifies the White Footed Dunnart as a species that cannot withstand further loss and as such is a Red Flag (OEH 2012).

As the species had been positively associated with the Development Area, efforts to identify suitable habitat and confirm the occurrence of the species in the offset areas became a Project priority. Several rounds of additional survey were required with the aim of detecting the species and allowing creation of required species credits.

Expert opinion may be used in a Biodiversity Certification Assessment to provide a professional judgment or opinion on a particular matter. Use of an expert report followed a failure to detect the species in the offset area through survey and hence directly relate the species to the offset site.

An expert report has been prepared, consistent with the Methodology by Elizabeth Ashby of Keystone Ecological, who was identified by the Office of Environment and Heritage as an expert on the White footed Dunnart, having studied the species extensively within the south east corner bioregion and published literature on these findings.

On the weight of evidence examined in Ms Ashby's analysis and observations that '*the offset areas are overwhelmingly similar to the sites where *Sminthopsis leucopus* had been captured*', (Ashby 2013), the White Footed Dunnart has been assumed to be present in the Conservation Areas and credit calculations performed on this basis.

The results of the Assessment demonstrate that the Conservation Areas identified are sufficient to offset the impacts of Certification to the White Footed Dunnart. Therefore, excluding the impacts on Red Flag Areas, the proposal meets the 'improve or maintain' test required under the Methodology.

Costs and contributions

The issue of costs associated with offset management became a point of contention during the development of the Strategy.

In order for a Planning Authority or a Party to pursue Biodiversity Certification and make a commitment to adopt the approach, like any business transaction, costs estimates weigh into decision making processes.

In regard to the future offset proposed, core management actions are mandated in the Methodology and for some species credit species the Threatened Species Profile Database (OEH 2012). However, these are merely broad statements of direction, and despite requests, there has been little guidance provided on expected levels of management, frequency of action, target states or benchmarks upon which performance can be measured and resources allocated. Remarkably, it is this detail that underpins the basis of the 'gain' or improvement in condition and habitat value of offset areas to balance a 'loss' from development areas.

Without this information, accurate costing is difficult.

The OEH have stated that this detail is a matter for Council - the applicant, to determine and that the Minister does not require information on quantum of effort expended on management activities to make a determination on an application for Certification. While the Minister may not require such critical information to make a decision, the community, Council and any parties to Certification clearly do in order to plan for and allocate an appropriate level of investment and resource to realize a *real*, not just a *theoretical*, 'maintain or improve' outcome.

Consequently, options to fund and service management obligations that may result from conferral of Biodiversity Certification have been explored based on management advice provided by relevant internal and external land managers.

Ongoing expenses to meet management responsibilities in the 407Ha offset area have been estimated at around \$230 per hectare per year, including maintenance, renewal and contingency expenses. These costings have been compared to similar management scenarios in other LGAs and with expenditure by the National Parks and Wildlife Service in neighboring Eurobodalla National Park, on an area basis. In consideration of economies of scale, included management actions and management history, the costings are comparable.

The final total costs of undertaking the Biodiversity Certification process will be dependent on the selected conservation measure and option to fund and service management obligations.

Funding avenues

To ensure access to adequate financial resource on an annual basis to meet management responsibilities in the offset areas, Council has considered and sought advice on the means to collect and manage funding. A range of options to achieve this was developed and evaluated and included voluntary planning agreements, rates, Biobanking, development contributions and dedication of portions of offset to the National Park estate.

The avenues available to smaller rural LGAs to facilitate an outcome post assessment are quite limited. In this case and in consideration of the risks, costs, administrative burden, practicalities and broader community benefits associated with each option Biobanking is recommended as the preferred solution to issues of security, management standards and accountability while simultaneously providing an independent financial mechanism (the Biobanking Trust fund) to support the operational concerns of offset management.

Using Biobanking as the conservation measure (instead of a cPVP as proposed in the exhibited draft Strategy), an estimated sum of \$2.9 million (Total Fund Deposit) would need to be invested into the Biobanking Trust Fund, (real discount factor of 3.5) *over time* to provide required annual payments for management. This would roughly equate to \$3,300 - \$4,500 per created residential lot in Broulee (depending on lot size and assuming a 50:50 contribution based on area of Certified land at Moruya Airport and Broulee). Under this scenario, it is possible through Agreement, that any contribution toward offset management resulting from Certification of land at Moruya Airport may be delayed until such time as re-development commences.

By way of comparison, should Council opt to set up a self-perpetuating fund to yield the required annual amount, a sum of around \$6 million would need to be invested *upfront*, (real discount factor of 1.5). This would roughly equate to between \$7000 – \$9000 per created residential lot in Broulee (depending on lot size and assuming a 50:50 contribution based on area of Certified land at Moruya Airport and Broulee)

A workable solution as to who pays and how much must now be negotiated. Before further progression of the application, the timing of developments and hence contributions from beneficiaries together with commencement of management must be planned. In

many situations these practicalities of implementation may present far greater challenges for applicants than actually running the assessment or gaining consent to clear red flags.

Exhibition

Following a resolution of Council (March 2013) and once the authority to exhibit was received from the OEH (April 2013), the Strategy was placed on public exhibition for the statutory period of 30 days from 22nd April. This period was subsequently extended by a further 2 weeks at the request of the community and in the interest of maximising opportunity to comment. At the completion of the formal exhibition, a total of 227 submissions were received from a diverse cross section of the community, including long term locals, recently settled retirees or families, regular visitors and persons with an interest in the development industry or local property market.

A review of submission content revealed that the proportion in outright support (18%) or outright disapproval (16%) of the proposal were roughly equivalent, (Eurobodalla Shire Council 2013). However, some 54% of respondents communicated a degree of support provided that certain conditions were met. These generally related to a desire for an increased level of security and a firm commitment to a high standard of management for the offset areas given the significance of the impact anticipated.

While the specifics of the concerns raised can be accessed via the Project website at www.eurocoast.nsw.gov.au, community perceptions and a number of key Issues raised are discussed under the headings below.

Improve or Maintain

A very clear message has been received in relation to the community's view and confidence in the 'improve or maintain' standard (which is required to be met with or without a red flag variation).

As is evidenced by the many related questions and comments, the community seeks assurance that responsibilities will be upheld in regard to ongoing management and that there is absolute protection afforded to conservation areas nominated to offset high conservation value losses. This should be in the form of a high standard of enforceable and funded management that is regularly audited and monitored.

Council heard that on face value the proposed offset area appears to be a good environmental outcome. However, this would only be true if adequate and sustained management is applied in order that these lands, which are currently in good condition, are not just locked up and left.

Further, at community meetings and indeed through many of the submissions received, it is clear that the concept of improve or maintain is difficult for many to understand in the context of the Broulee Biodiversity Certification Assessment (Eurobodalla Shire Council 2013). Biodiversity Certification materials produced by the OEH infer that the basis of the 'maintain and improve' standard relates to a 'gain' or improvement in condition and habitat value of offset areas to balance a 'loss' from impacts at development areas.

There is a perception that the proposed offset lands are already 'protected' in that they are partly community land, a large proportion (based on area) is already under conservation management (Bengello cPVP), and, other operational parcels are covered in the same Endangered Ecological Community and presumably the very same threatened species that have limited continued development of Broulee to date. It followed that if the protections of the *Act* were effective, it is not clear where the 'gain' to meet the 'maintain or improve' test comes from as the offset areas should already be secure?

Again, this leads back to management, and a clear requirement that 'improvement' must be won through adequate financial resourcing and a higher condition state than present value.

Neither the detail required (and consequently provided) in a Strategy, nor in the nominated conservation measure (a cPVP as exhibited) is sufficient to satisfy these demands. Despite the fact that the OEH, nor the Minister for Environment, requires information on the quantum of effort expended on specific management actions to make a determination on an application for Certification, the community clearly does. Without this detail, it is not clear whether or not the offset lands will actually provide a 'gain' at the end of the day.

To ensure an 'improve or maintain' outcome, an appropriate level of investment in management should occur in the offset areas with commitments, responsibilities and measurable targets provided in a detailed management plan. If provided to offset the loss of a limited public asset, the whole community should know up-front to what standard conservation areas will be managed and be confident that there is adequate resourcing to support ongoing maintenance.

In the interests of improving confidence in the outcomes described in the Strategy, Council intends to publicly exhibit and open this detail to comment prior to finalising the Strategy and requesting a decision of the Minister on conferral.

Private gain : public benefit

Submissions called for a clear indication of developer contribution to management of the offset areas and a desire for a clear indication of costs. This information is not a required inclusion of a Biodiversity Certification Strategy, and reference was made in the document to an intention to separately explore and report this detail, a commitment Council intends to uphold.

Concern was communicated throughout the exhibition that the private benefit of the proposal be reflected in an appropriate financial contribution toward ongoing management in order that the whole community is not left to fund the resulting obligations of this process.

The Strategy acknowledged that there are significant public benefits derived from both the development of Broulee village and in providing for the re-development of the Moruya airport including; commercial and economic gains through support and expansion of local businesses, transport and tourism, social gains realised through support of educational and aged care facilities, provision of affordable housing opportunities, and broader infrastructure and servicing benefits to the whole community.

There is also public benefit in the improved management outcomes for 407Ha of high conservation value asset that will be secured and managed in perpetuity as per the Biodiversity Certification Strategy 2013.

In consideration of these many public benefits, Council, on behalf of the community, will also need to contribute financially to any future offset management fund.

Bangalay Sand Forest

Numerous submissions made the point that the exhibited Strategy is limited in its scope and does not consider the entire extent of Bangalay Sand Forest in the locality or afford any protection or security to this valued asset.

While there are significant remnant stands of the EEC, Bangalay Sand Forest in the Broulee locality, it is acknowledged that cumulative impacts have and continue to be realised across its distribution; on rural zoned lands, residential zoned lands, special use zoned lands, lands zoned for recreation and for environmental protection.

The community sentiment communicated highlights a misconception about what a Biodiversity Certification Strategy actually is and does. The Broulee Strategy was drafted to comply with the specific requirements of part 7AA s126K of the *Act*. It is a Policy for the implementation of conservation measures in relation to Certification of particular land rather than an overall Plan of Management for Bangalay Sand Forest within the Eurobodalla.

The Methodology does not make any assertion on tenure of offset, but does require a Certification proposal to meet the 'improve or maintain' standard. The Strategy, as exhibited, addresses this requirement with public land proposed as Conservation Area.

It is beyond the scope and intent of the Strategy and subject Biodiversity Certification process to address future development on lands outside of the defined Assessment Area. Existing protections provided for under the *Act* (s5A EP&A Act) and *Native Vegetation Act 2003* continue to apply to private and public tenure lands supporting this EEC in the locality.

Penalties and audit

Among the volume of submissions was a range that questioned the penalties under the *Act* for failing to meet management obligations in the Conservation Areas and the repercussions of allowing the offset lands to deteriorate after the benefit of development has been realised.

Unlike Biobanking, there is no Regulation to support the Biodiversity Certification scheme, but the Act outlines the means by which the Minister *may* require a party to a biodiversity certification to rectify any failure to comply with the approved measures and that she/he *can* suspend, revoke or modify Biodiversity Certification under particular circumstances if she/he elects to do so. Any penalty applied for breaches of agreed performance, is to be an amount the Minister considers reasonable to cover the costs of implementing the relevant approved measures or equivalent conservation measures.

It has been argued that this is non-committal from a compliance perspective, open to political influence and a poor deterrent once development has already proceeded. The 'penalty' described merely constitutes upholding the obligations originally committed to.

A degree of concern and skepticism was communicated regarding the lack of detail and assurance of management performance auditing of the offset.

Section 8.1 of the Methodology states that conservation measures that are proposed in the application but are not in place by the time Biodiversity Certification is conferred should be secured via a Biodiversity Conservation Agreement. A Biodiversity Conservation Agreement could also provide an opportunity to establish upfront responsibilities and specific obligations in regards to levels of and timing of management applied, monitoring, reporting and compliance requirements to meet community expectations.

In light of this and in order to instill more confidence in the process and outcome, it may also be appropriate to develop a range of penalties in any Order of Certification, as a warranty and incentive to apply agreed management. In this way, the community, who has demonstrated an ongoing interest in the natural assets of the Broulee area, can have confidence in the outcomes described in the Strategy.

General

Overall, the bulk of submissions indicated an appreciation of the reasons why the Broulee Biodiversity Certification process has been undertaken. The intent of trying to strike a balance between development and conservation outcome is understood and acknowledged, but not always agreed with.

The view that the Strategy will facilitate development, support the local economy, grow business and encourage local industries and services is widely held. Statements relating to job creation and opportunities for local youth are on the one hand argued to be a direct positive outcome of the process, but other opinions foresee this as only a short term benefit resulting from a long term cost.

Working towards an outcome

Whilst Council acknowledges the value and importance of sustainably managing the State's biodiversity, it also recognises the need to provide for economic growth, community services and facilities, and a supply of affordable residential land via sound strategic planning process. Certification of urban zoned lands and special use airport lands will permit development to proceed, while securing long-term and comprehensive protection for significant biodiversity values on public lands within the locality.

Although there are various biodiversity offsetting criteria in operation around Australia, few demonstrate a high level of maturity and the NSW Biodiversity Certification process is no exception. The process represents a significant relaxation of rules previously applied in the assessment of impact on threatened species and high conservation value areas and will likely be invoked in situations where the standard approach to development has failed or is too costly.

In this case, Biodiversity Certification appears to lead to an outcome for developments previously held in a planning and assessment limbo. Benefits of this streamlined assessment process have included:

- a collective resolution to longstanding and complex planning issues
- greater certainty to landowners regarding potential land uses and future development opportunities
- savings in time and money spent on individual flora and fauna studies and negotiating individual conservation outcomes
- secure conservation outcomes for high value natural environments and strategically targeted offset efforts
- a reduction in the cumulative impacts resulting from continued ad-hoc development

Our communities and politicians are beginning to understand that protected areas cannot offer the full solution to the States continued biodiversity loss. The challenge is to find sustainable planning and management approaches that provide for development while sustaining productive landscapes that integrate biodiversity conservation.

Biodiversity Certification attempts to do this, but may require refinement to improve function in real world application. A full suite of supporting tools, further guidance and testing is necessary to ensure the aim of objective and consistent decision-making based on robust scientific criteria and data is achieved.

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