

# Biodiversity Certification Agreement

Between

The Minister administering the *Biodiversity Conservation Act 2016* (NSW)

and

MHE Property Co Pty Ltd ATF MHE Land Trust 3 (Developer)

and

Carol Ann Cecilia Richardson (the Landowner)



Brendan Bruce, A/Deputy Secretary  
Biodiversity, Conservation & Science  
24/03/2023

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Brendan Bruce, A/Deputy Secretary  
Biodiversity, Conservation & Science  
24/03/2023

**Agreement made at** \_\_\_\_\_ **on** \_\_\_\_\_

**Parties** **Minister for Environment and Heritage** as the Minister administering the *Biodiversity Conservation Act 2016* (NSW) (**the Minister**)

and

MHE Property Co Pty Ltd ATF MHE Land Trust 3 ABN 32 817 137 052 (**the Developer**)

and

Carol Ann Cecilia Richardson (**the Landowner**)

### **Background**

- A. On 12 March 2021, the Developer on behalf of the Landowner made an application for Biodiversity Certification (**Biodiversity Certification Application**) for land at 45 Malloway Road, Chain Valley Bay, within the Central Coast local government area, being Lot 5 DP 1228880 (**the Biodiversity Certification Assessment Area**) under Part 8 of the BC Act.
- B. The Landowner is the registered owner of the Biodiversity Certification Assessment Area.
- C. The Biodiversity Certification Application relates to the proposed manufactured home estate and residential subdivision of the Biodiversity Certification Assessment Area.
- D. The Biodiversity Certification Assessment Report (**BCAR**) identified proposed conservation measures including:
1. the retirement of:
    - i. 32 Ecosystem Credits for impacts to PCT 1636
    - ii. 1 Species Credit for impact to the Swift Parrot
    - iii. 49 Species Credits for impact to the Southern Myotis
    - iv. 1 Species Credit for impact to the Masked Owl
    - v. 35 Species Credits for impact to the Brushed-tailed Phascogale
  2. the preparation and implementation of a biodiversity management plan
  3. that the Avoided Land and Conservation Land be:
    - i. retained within a single lot and not further subdivided, and
    - ii. rezoned from C3 Environmental Management to C2 Environmental Conservation.
- E. The Parties have identified a further proposed conservation measure, being the establishment of a biodiversity stewardship site over the Avoided Land and

Conservation Land via a Biodiversity Stewardship Agreement with the Biodiversity Conservation Trust.

- F. The retirement of Ecosystem Credits and Species Credits is to be delivered in accordance with an order for Biodiversity Certification.
- G. This Agreement will be registered on the title of the Biodiversity Certification Assessment Area. It will apply to the Avoided Land, Conservation Land and the Certified Land, but is not required to be registered on the title of subsequent lots created for residential occupation and the manufactured home estate.

## Operative provisions

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### 1. Definitions and Interpretation

#### 1.1 Definitions

In this Agreement, unless the context indicates otherwise:

**Agreement** means this Agreement titled 'Biodiversity Certification Agreement' and includes all schedules.

**Avoided Land** means the land identified as "Avoided Land" on the map in Schedule in Schedule 1a of this Agreement.

**Avoided and Conservation Land Biodiversity Management Plan** means a plan prepared in accordance with clause 5.2(a)(ii)(B) of this Agreement and approved under clause 5.3 of this Agreement, which contains measures to manage biodiversity identified in the "Vegetation Management Plan" in section 6.2 of the BCAR to the extent those measures apply to the Avoided Land and the Conservation Land.

**BC Act** means the *Biodiversity Conservation Act 2016* (NSW).

**BC Regulation** means the *Biodiversity Conservation Regulation 2017* (NSW).

**Biodiversity Certification** has the same meaning as in section 8.2 of the BC Act.

**Biodiversity Certification Assessment Area** has the meaning given in Recital A.

**Biodiversity Certification Application** has the meaning given in Recital A.

**Biodiversity Certification Assessment Report (BCAR)**: means the biodiversity certification assessment report within the meaning of the BC Act dated 28 January 2022 prepared for the purposes of the Biodiversity Certification Application, referred to in Recital D.

**Biodiversity Credit** means a biodiversity credit created under Part 6 Division 4 of the BC Act and includes a reference to an Ecosystem Credit and a Species Credit.

**Biodiversity Stewardship Agreement** has the same meaning as in section 1.6 of the BC Act.

**Business Day** means any day except for Saturday or Sunday or a day which is a public holiday in Sydney.

**Certified Land** means the Biodiversity Certification Assessment Area on which Biodiversity Certification has been conferred and is in force under Part 8 of the BC Act.

**Clearing** has the same meaning as in section 60C of the *Local Land Services Act 2013* (NSW).

**Conservation Land** means the land identified as "Conservation Land" on the map in Schedule 1a of this Agreement.

**Department** means the NSW Department of Planning and Environment and any name it may be known by in the future.

**Development Completion** means:

- (i) in relation to a residential subdivision development, the registration of the title for the particular Residential Lot; and
- (ii) in relation to a manufactured home development, the issuing of an approval to operate a manufactured home estate under section 68 of the *Local Government Act 1993* (NSW).

**Development Phase** means:

- (i) in respect of each individual Residential Lot, the period from the Effective Date until Development Completion for that Residential Lot; and
- (ii) in respect of the manufactured home development, the period from the Effective Date until the issuing of an approval to operate a manufactured home estate under section 68 of the *Local Government Act 1993* (NSW).

**Dispute** has the meaning given in section 9(a).

**Effective Date** means the date on which Biodiversity Certification is conferred by the Minister on the Certified Land.

**Environment Agency Head** has the meaning given in section 6.1 of the BC Act.

**EP&A Act** means the *Environmental Planning & Assessment Act 1979* (NSW).

**Force Majeure Event** means an event that is beyond the reasonable control of the Developer or the Landowner, including any natural disaster, fire, flood, accident, war, riot, act of terrorism, biohazard, a serious epidemic, or a change in legislation, but only to the extent that such events were beyond the Developer's or the Landowner's reasonable control. A force majeure event does not include any obligation to pay money, a labour dispute or shortage of materials or labour.

**Landowner** means, at the Effective Date, Carol Ann Cecilia Richardson, and any successors in title of the Biodiversity Certification Assessment Area

**Minister** means the Minister of the State of New South Wales administering the BC Act and includes his or her successors in office and where not repugnant to the context includes the servants and agents of the Minister.

**MHE Property** means MHE Property Co Pty Ltd as trustee for MHE Land Trust 3 ABN 32 817 137 052

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**Party** means a Party to this Agreement and includes a person or persons taken to be Parties to this agreement by operation of section 8.17 of the BC Act.

**Plant community type (PCT):** a NSW plant community type identified using the plant community type classification system published by the Department.

**Proposed Biodiversity Stewardship Site** means the whole of the Avoided Land and the Conservation Land which is intended to be a "biodiversity stewardship site" within the meaning of section 1.6 of the BC Act.

**Registrar-General** has the same meaning as in the *Real Property Act 1900* (NSW).

**Residential Lot** means a lot created in the Biodiversity Certification Assessment Area as a result of a residential subdivision approved under the EP&A Act.

## 1.2 Interpretation

In this Agreement:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) **person** includes an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(c) a reference to a Party includes that Party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to a document is to that document as varied, novated, ratified or replaced from time to time;

(e) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(f) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(g) a reference to a Party, clause, schedule, exhibit, attachment or annexure is a reference to a Party, clause, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;

(h) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(i) includes in any form is not a word of limitation;

(j) where a schedule contains obligations of any Party then the obligation so expressed shall be read and construed and shall constitute obligation on the part of the relevant Party, as the case may be, to be performed or observed under this Agreement;

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- (k) neither this Agreement nor any part of it is to be construed against a party on the basis that the Party or its lawyers were responsible for its drafting;
- (l) if a Party to this Agreement is subsequently made up of more than one person:
  - (i) an obligation of those persons is joint and several;
  - (ii) a right of those persons is held by each of them severally; and
  - (iii) any references to that party is a reference to each of those persons separately, so that (for example), a representation, warranty or undertaking is given by each of them separately.

### **1.3 Agreement to run with the land**

In accordance with section 8.17 of the BC Act, when registered by the Registrar-General, this entire Agreement is binding on and is enforceable against the owner of the land over which it is registered from time to time as if each owner for the time being had entered into the Agreement.

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## **2. Commencement**

- (a) This Agreement is to be executed by the Parties prior to the Effective Date.
- (b) This Agreement shall become effective on the Effective Date.
- (c) This Agreement has effect indefinitely.

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## **3. Status of this Agreement**

- (a) The Parties agree that this Agreement:
  - (i) is a biodiversity certification agreement within the meaning of Part 8 of the BC Act; and
  - (ii) establishes the obligations of the Landowner and the Developer, to the applicable areas in the Biodiversity Certification Assessment Area.
- (b) For the purposes of clause 5.1(1)(c) of the BC Regulation, the Minister advises that the legal obligations created under this Agreement:
  - (i) are not created for biodiversity offset purposes; and
  - (ii) do not make provision for biodiversity offsets in accordance with clause 5.1(1)(c)(i) of the BC Regulation.

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## **4. Registration of this Agreement and Notice to Purchasers**

- (a) The Developer, with reasonable assistance from the Landowner as required, agrees to use its best endeavours, and at its own expense, to lodge or arrange for the lodgement of this Agreement in registrable form with the Registrar-General within ten (10) Business Days of the Effective Date in order to secure the registration of this Agreement on the title to

the Biodiversity Certification Assessment Area.

- (b) The Developer and the Landowner, at their own expense and risk, must take all practicable steps and otherwise do anything the Minister reasonably requires of each party, to procure:
  - (i) the execution of any documents necessary to enable registration of the Agreement on the title to the Biodiversity Certification Assessment Area; and
  - (ii) the registration of this Agreement by the Registrar-General in the relevant folios of the register as soon as possible after lodgement of the Agreement for registration under clause 4(a).
- (c) The Developer, within 21 days of registration of this Agreement on the title to the Biodiversity Certification Assessment Area, must provide the Minister with evidence of registration of this Agreement.
- (d) The Developer and the Landowner agree to provide notice of this Agreement to purchasers of any land in the Biodiversity Certification Assessment Area.
- (e) If the Biodiversity Certification Assessment Area is subdivided, this Agreement is only required to be registered on any lots containing the Avoided Land and Conservation Land.

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## **5. Obligations**

### **5.1 Developer obligations**

The Developer agrees to comply with all relevant obligations of the Developer set out in this Agreement.

### **5.2 Landowner obligations**

- (a) The Landowner agrees to:
  - (i) comply with all relevant obligations of the Landowner set out in this Agreement;
  - (ii) in good faith, apply to enter into a Biodiversity Stewardship Agreement within 12 months of the Effective Date and:
    - (A) if the application is successful, establish a biodiversity stewardship site over the whole of the Avoided Land and the Conservation Land, or
    - (B) if the application is unsuccessful:
      - (1) within six (6) months of receiving notification that the application is unsuccessful, prepare and submit to the Department for approval a draft Avoided and Conservation Land Biodiversity Management Plan to apply to the Avoided Land and the Conservation Land in perpetuity,



- (2) implement and comply with the Avoided and Conservation Land Biodiversity Management Plan upon completion of the Development Phase, and
- (iii) ensure that the Avoided Land and Conservation Land remains in a single lot and is not further subdivided,

### **5.3 Approval of the Avoided and Conservation Land Biodiversity Management Plan**

If the Landowner is required to prepare and submit the Avoided and Conservation Land Biodiversity Management Plan in accordance with clause (ii)(B) of this Agreement, the Department will, in good faith, make all reasonable attempts to approve the draft Avoided and Conservation Land Biodiversity Management Plan within three months of the draft Avoided and Conservation Land Biodiversity Management Plan being submitted to the Department by the Landowner. If the draft Avoided and Conservation Land Biodiversity Management Plan is not approved, the Department will provide reasons why it is not approved.

### **5.4 Conservation of Avoided Land and Conservation Land**

The Developer and the Landowner must:

- (i) ensure that there is no disturbance of the Avoided Land or Conservation Land, including the removal of any native vegetation, fallen timber or habitat, or any earthworks, from the Avoided Land or Conservation Land; and
- (ii) use best endeavours to establish and maintain the Avoided Land and Conservation Land with C2 Environmental Conservation zoning.

### **5.5 Reasonable steps**

The Developer and the Landowner agree to take all reasonable steps to ensure that persons who enter or intend to enter the Avoided Land or Conservation Land comply with the obligations of the Developer and the Landowner in relation to the Avoided Land and the Conservation Land under this Agreement.

### **5.6 Clearing**

The Parties acknowledge that clauses 5.4 and 5.5 apply, despite any legislation, regulation, rule or code which provides that the Landowner or Developer is permitted to clear vegetation on the Avoided Land or the Conservation Land.

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## **6. Biodiversity Stewardship Site**

In the event of any inconsistency between this Agreement and a Biodiversity Stewardship Agreement entered into over the Avoided Land and the Conservation Land, the Biodiversity Stewardship Agreement will prevail.

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## 7. Enforcement

- (a) The Parties acknowledge that the Minister has rights under the BC Act and at Law in the event of a default by the Landowner or Developer under this Agreement, including rectification rights.
- (b) In accordance with section 13.16 of the BC Act, and without limiting other remedies available to the Minister, the Minister or a person acting with the written consent of the Minister, may bring proceedings in the Land and Environment Court for an order to remedy or restrain a contravention of this Agreement.

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## 8. Permissions, consents and authorisations

- (a) Each Party to this Agreement is responsible for obtaining all necessary licences, consents, authorisations, permits or approvals in order to lawfully comply with and carry out its obligations under this Agreement.
- (b) Each Party to this Agreement agrees that this Agreement may be executed electronically in accordance with the *Electronic Transactions Act 2000 (NSW)*.

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## 9. Force Majeure

- (a) In relation to a Force Majeure Event, the Developer and the Landowner:
  - (i) are not required to comply with their obligations under this Agreement; and
  - (ii) are not liable for any loss or liability suffered or incurred by the Minister as a result of the Landowners' inability to comply with its obligations,to the extent that the Developer or Landowner is prevented from complying, or its ability to comply is delayed, due to a Force Majeure Event.
- (b) Clause 9(a) applies so long as the Force Majeure Event continues to prevent the Developer or Landowner from complying with their obligations under this Agreement.
- (c) If the Developer or the Landowner's ability to comply with their obligations under this Agreement is affected by a Force Majeure Event each party must:
  - (i) promptly notify the Minister, in accordance with clause 16, as soon as it becomes aware that it is (or is likely to be) so affected, giving reasonable details of the Force Majeure Event and the obligations that will be affected;
  - (ii) take all reasonable steps to prevent, limit and minimise the effect of the Force Majeure Event on its obligations and comply again with its obligations as soon as reasonably possible, and

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- (iii) keep the Minister informed of the expected duration of the Force Majeure Event and the steps taken to comply with clause 9(c)(ii).

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## 10. Dispute resolution

- (a) Where there is a dispute, difference or claim (**Dispute**), the Party raising the Dispute must notify the other Parties of the nature of the Dispute, including the factual and legal basis of the Dispute.
- (b) Within 14 days of the notice, the Parties, or nominated senior representatives of the Parties, must confer to attempt to resolve the Dispute, and if the dispute cannot be resolved within 21 days of the written notice, the parties will refer the Dispute to mediation.
- (c) The Parties will agree on a mediator, the terms of appointment of the mediator and the terms of the mediation in writing within 28 days of the referral of the Dispute to mediation under clause 10(b). If they cannot agree on those matters, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- (d) If the Dispute has not been resolved within 28 days of the appointment of the mediator, the mediation process will be at an end and any party may commence court proceedings in respect of the Dispute.
- (e) Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- (f) The Parties are to share equally the costs of the President (if any), the mediator and the mediation.

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## 11. GST

- (a) The Parties acknowledge and agree that for any taxable supply made by one Party to another Party under this Agreement the Party which has received the supply will on receipt of a tax invoice from the supplier make a payment to the supplier that covers both the value of the supply and the GST liability of the Party that has made the supply.
- (b) This clause will not merge on completion or termination of this Agreement.
- (c) Words used in this clause that are defined in the GST Law have the meaning given in that legislation.
- (d) In this clause, GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

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## 12. Releases and indemnities

- (a) Each Party agrees to carry out their obligations under this Agreement at

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their own risk.

- (b) Each Party, other than the Minister (severally, not jointly), agrees to release and indemnify the Minister from any claim, liability or loss arising from, and costs incurred in connection with a breach of the respective obligations of the Party under this Agreement except to the extent caused or contributed to by the Minister's negligent act or default under this Agreement.
- (c) The indemnity in clause 12(b) is a continuing obligation, independent of the other obligations of the Party under this Agreement and continues after the Agreement ends.

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### **13. Costs**

- (a) Subject to clause 11(GST), each Party bears its own costs in connection with the preparation and execution of this Agreement.

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### **14. General provisions**

#### **14.1 Prior representations**

No Party can rely on an earlier document, anything said or done by another Party, or by an authorised officer, agent or employee of that Party, before the Agreement was executed.

#### **14.2 Further acts**

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

#### **14.3 Governing law and jurisdiction**

This Agreement is governed by the laws of the State of New South Wales and the Parties agree to submit to the jurisdiction of the courts of that State.

#### **14.4 No fetter**

- (a) Without prejudice to or limiting the express obligations that each Party has agreed to perform under this Agreement, this Agreement is not intended to operate to fetter, in any unlawful manner:
  - (i) the sovereignty of the Parliament of the State of New South Wales to make any law;
  - (ii) the power of the Executive Government of the State of New South Wales to make any statutory rule; or
  - (iii) the exercise of any statutory power or discretion of any Minister of the State.
- (b) Nothing in this Agreement is to be construed as requiring any Party to do anything that would cause it to be in breach of any of its obligations at law, and without limitation and nothing in this Agreement is to be construed as limiting or fettering in any way the exercise of any statutory

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discretion or duty.

#### **14.5 No joint venture, etc.**

Unless otherwise stated:

- (a) nothing in this Agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the Parties; and
- (b) no Party has the authority to bind any other Party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other Party or to pledge any other Party's credit.

#### **14.6 Representations and warranties**

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under this Agreement.

#### **14.7 Severability**

- (a) If any part of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- (b) If any part of this Agreement is illegal, unenforceable or invalid, that part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

#### **14.8 Variation**

- (a) This Agreement may only be varied by a subsequent agreement between:
  - (i) the Minister, the Developer and the Landowner during the Development Phase, or
  - (ii) the Minister and the owner of the Avoided Land and the Conservation Land after the Development Phase.
- (b) No variation of this Agreement will be of any force or effect unless it is in writing and signed by the Parties specified in clause 14.8(a).

#### **14.9 Waiver**

- (a) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or a breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
- (d)

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**14.10 Good faith**

Each Party must act in good faith towards all other Parties and use its best endeavours to comply with the spirit and intention of this Agreement.

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**15. Publication**

Each Party acknowledges that a copy of this Agreement is to be published on a NSW government website maintained by the Environment Agency Head in accordance with clause 8.5 of the *Biodiversity Conservation Regulation 2017*.

The Environment Agency Head will restrict access to all personal information contained in this Agreement in accordance with the *Privacy and Personal Information Protection Act 1998*.

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**16. Notices**

**16.1 Form**

Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing delivered, posted or sent by electronic service address to that Party at its addresses set out below.

**The Minister**

Address: Environment and Heritage Group  
Department of Planning and Environment  
Locked Bag 5022  
PARRAMATTA NSW 2124

Attention: [REDACTED]

Telephone: [REDACTED]

Email address: [REDACTED]

**The Developer**

Address: MHE Property Co Pty Ltd ATF MHE Land Trust 3  
[REDACTED]

Attention: [REDACTED]

Telephone: [REDACTED]

Email address: [REDACTED]

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### **The Landowner**

Address: 45 Mulloway Road, Chain Valley Bay NSW, 2259  
Attention: Carol Richardson

Telephone: [REDACTED]

Email address: [REDACTED]

### **16.2 Change in details**

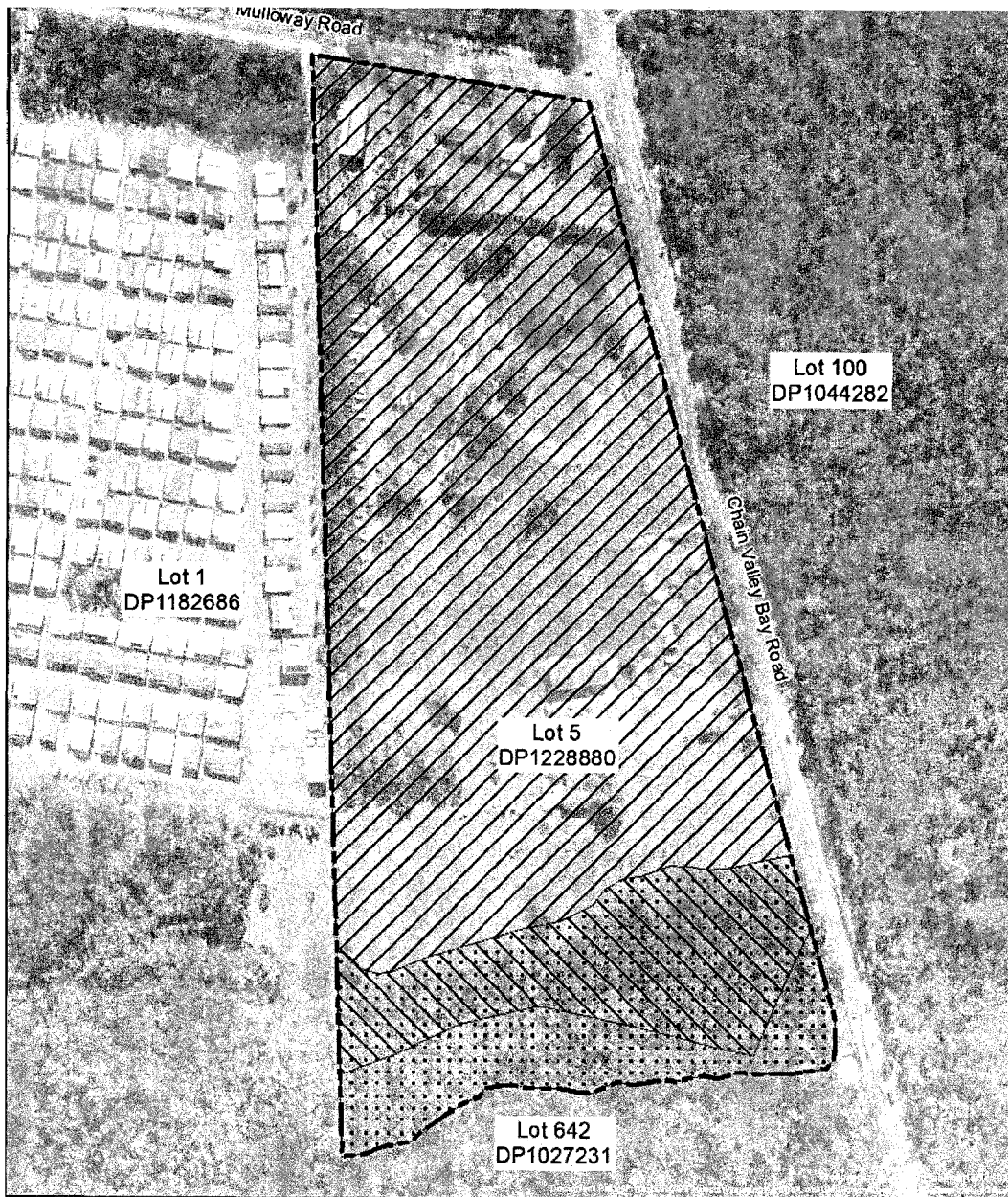
The name or title of the nominated officer or the address for the Parties referred to in clause 16.1 above may be updated from time to time by written notice being sent to the other Parties by the Party (which in the case of the Minister may include an officer of the Department) advising of the new officer (or title of an office) and address to which such documents, information or notification may be sent.

### **16.3 Receipt**





- (a) Any notice, consent, information, application or request is to be treated as given or made at the following time:
  - (i) if it is delivered, when it is left at the relevant address;
  - (ii) if it is sent by post, two (2) Business Days after it is posted (unless the contrary is proved); or
  - (iii) If it is sent by electronic service address, by transmitting an electronic copy of the document to that address
- (b) If any notice, consent, information, application or request is delivered or sent by electronic service address, on a day that is not a Business Day or after 5pm on any Business Day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next Business Day.

# Schedule 1: 45 Mulloway Road, Chain Valley Bay

## Schedule 1a



**Legend**

-  Biodiversity certification assessment area
-  Land proposed for biodiversity certification
-  Avoided land
-  Conservation land

0 25 50 75 100 Meters  
 Datum: Projection: GDA 1984



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**Figure 1 – Biodiversity Certification Assessment Area – Certified Land, Avoided Land and Conservation Land**



**Executed as an agreement under section 8.16 of the BC Act**

Executed by The Honourable James Griffin, MP Minister for Environment and Heritage for the State of New South Wales as the Minister administering the *Biodiversity Conservation Act 2016* (NSW)



Brendan Bruce, A/Deputy Secretary  
Biodiversity, Conservation & Science  
24/03/2023

Delegate for the Hon. James Griffin, MP.  
Minister for Environment and Heritage



Name of Witness in full (written in block letters)



Signature of Witness

Executed by Carol Ann Cecilia Richardson



Signature of Carol Richardson



Name of witness (written in block letters)



Signature of Witness

Executed by MHE Property Co. Pty Ltd as trustee for MHE Land Trust 3 ABN 73 634 534 222 in accordance with s127 of the *Corporations Act 2001* (Cth)



Signature of Director/Company secretary



Name of Director/Company secretary (written in block letters)



Name of Director (written in block letters)



Signature of Director