

CONSERVATION AGREEMENT

Conservation Agreement for the
protection and conservation of the
Grey-headed Flying-fox (*Pteropus
poliocephalus*) at Batemans Bay
NSW

Minister for the Environment on behalf of the
Commonwealth of Australia

Eurobodalla Shire Council

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Details

Parties

1. Minister for the Environment and Energy (**Minister**) on behalf of the Commonwealth (**Commonwealth**)
2. Eurobodalla Shire Council (**Council**)

Recitals

- A. Section 305(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) provides that the Minister may, on behalf of the Commonwealth, enter into a conservation agreement for the protection and conservation of biodiversity in the Australian jurisdiction.
- B. Pursuant to Section 305(1A) of the EPBC Act, the purpose of this Agreement is to:
 - (a) provide for the protection and conservation of the **Grey-headed Flying-fox** (*Pteropus poliocephalus*) and its **Habitat** at Batemans Bay, NSW, in the Eurobodalla Shire Council Local Government Area (**LGA**); and
 - (b) provide for the abatement of processes, and the mitigation or avoidance of actions, that might adversely affect the Grey-headed Flying-fox and its Habitat at Batemans Bay, NSW in the Eurobodalla Shire Council LGA.
- C. The Minister, on behalf of the Commonwealth, has agreed to enter into this Agreement with the Council under section 305(1) of the EPBC Act to give effect to the purpose described in Recital B.
- D. Section 306A of the EPBC Act provides that the Minister may include in a conservation agreement a declaration to the effect that actions in a specified class of actions do not need approval under Part 9 for the purposes of a specified provision of Part 3.
- E. The Minister makes such a declaration in this Agreement and, for the purposes of section 306A(2) of the EPBC Act, is satisfied that actions in the specified Class of Actions are not likely to have a significant impact on the **Grey-headed Flying-fox**.
- F. For the purposes of section 305(2) of the EPBC Act, the Minister is satisfied that:
 - (a) the implementation of this Agreement will result in a net benefit to the conservation of biodiversity; and
 - (b) this Agreement is not inconsistent with any recovery plan, threat abatement plan or wildlife conservation plan.
- G. Pursuant to section 307 of the EPBC Act, this Agreement is binding on the Commonwealth and the Council.

Agreed terms

1. Definitions and interpretation

1.1 Definitions

In this Agreement, except where the contrary intention is expressed, terms have the meaning they are given in the EPBC Act and otherwise the following definitions are used:

Agreement	this agreement between the Minister and the Council including its Schedules and Annexures, as amended from time to time in accordance with section 308 of the EPBC Act or clause 9.3 of this Agreement.
Agreement Details	Schedule 1 of this Agreement.
Business Day	in relation to the doing of any action in a place, any day other than a Saturday, Sunday or public holiday in that place.
Class of Actions	the class of actions specified in clause 5.2 of this Agreement.
Commonwealth	the Commonwealth of Australia.
Council	the Eurobodalla Shire Council.
Council Representative	the person identified in Item 4 of the Agreement Details, or other person notified to the Department by the Council.
Department	the Commonwealth agency responsible for administering the EPBC Act, currently the Department of the Environment.
Department Representative	the person identified in Item 2 of the Agreement Details or other person notified to the Council by the Department.
Electronic Communication	has the same meaning as in the <i>Electronic Transactions Act 1999</i> (Cth).
EPBC Act	The <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
EPBC Act Flying-fox Guidelines	the Department's <i>Referral guideline for management actions in grey-headed and spectacled flying-fox camps</i> September 2015.
FFMP	the Flying-fox Management Plans for Grey-headed Flying-fox at Batemans Bay, NSW, comprising the three plans as developed by or for the Eurobodalla Shire Council to address concerns relating to the management and conservation of flying-fox in urban areas of

Batemans Bay, and attached at Schedule 2 of this Agreement:

- Water Gardens Grey-headed Flying-fox Camp Management Plan 2015
- Batemans Bay Flying-fox Camp Dispersal Plan 2016-2019
- Batemans Bay Grey-headed Flying-fox Management Plans: Supplement August 2016

Grey-headed Flying-fox

The Grey-headed Flying-fox (*Pteropus poliocephalus*) listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Habitat

vegetation supporting the roosting of Grey-headed Flying-foxes at, or within 5km of, the Batemans Bay Flying Fox Camp as shown in Appendix A to the *Batemans Bay Grey-headed Flying-fox Management Plans: Supplement August 2016* and is not an EPBC Act listed threatened species or ecological community.

LGA

Eurobodalla Shire Local Government Area as defined by the Australian Statistical Geography Standard, January 2014. The Eurobodalla Shire LGA map is available at the NSW Office of Local Government [website](#).

Minister

the Minister administering the EPBC Act or a delegate of the Minister pursuant to section 515(1) of the EPBC Act.

Period of significant population stress

a period during which events place significant stress on a national population of the Grey-headed flying-fox as outlined in the EPBC Act Flying-fox Guidelines.

Report

the report that the Council is required to produce and provide to the Department in accordance with clause 7.2.

Review

the review the parties agree to undertake in accordance with clause 7 of this Agreement.

1. Interpretation

In this Agreement, except where the contrary intention is expressed:

- (b) the singular includes the plural and vice versa, and a gender includes other genders;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) the meaning of general words is not limited by specific examples introduced by meaning of, for example or similar expressions;
- (e) a reference to a clause, paragraph, Schedule or Annexure is to a clause or paragraph of, or Schedule or Annexure to, this Agreement;
- (f) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (g) a reference to AUD, A\$, \$A, dollar or \$ is to Australian currency;
- (h) a reference to time is to the time in the place where the obligation is to be performed;
- (i) a reference to a party is to a party to this Agreement and includes the party's executors, administrators, successors and permitted assignees and substitutes;
- (j) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity; and
- (k) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
- (l) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it.

2. Agreement Period

- (a) This Agreement commences on the date of execution by the last party.
- (b) This Agreement ends and ceases to be of any effect on the date the Agreement is terminated under clause 9.

3. Priority of documents

If there is any inconsistency between any of the documents forming part of this Agreement those documents will be interpreted in the following order of priority to the extent of the inconsistency:

- (a) the 'Agreed terms' of this Agreement (being clauses 1 through to 11);
- (b) Schedule 2 – FFMP;

- (c) Schedule 1 - Agreement Details;
- (d) any Annexure(s) in their order of appearance; and
- (e) documents incorporated by reference in this Agreement.

4. Grey-headed Flying-fox management

- (a) The declaration in clause 6(a)6(a) only applies where the Council, in the taking of an action that affects the Grey-headed Flying-fox and its Habitat, acts in accordance with:
 - (i) the FFMP; and
 - (ii) the EPBC Act Flying-fox Guidelines;
- (b) The parties acknowledge:
 - (i) this Agreement does not require the Council to act in accordance with the FFMP in all circumstances; and
 - (ii) where the Council proposes not to act in accordance with the FFMP, the Council (as the person proposing to take the action) should consider whether the proposed action needs to be referred for a decision on whether assessment and approval under the EPBC Act is required before it can proceed.

5. Activity

5.1 Activity Description

- (a) Where the Council makes a decision in relation to actions that may affect the Grey-headed Flying-fox and its habitat and the Council decides to apply the FFMP, it must:
 - (i) act in accordance with the FFMP; and
 - (ii) impose the relevant mitigation standards described in the EPBC Act Flying-fox Guidelines.
- (b) The Council and the Department will also pursue a range of actions at Batemans Bay, NSW, to support the conservation and recovery of the Grey-headed Flying-fox, either independently or in collaboration.
 - (i) The Council must:
 - (A) deliver the following benefits by implementing the conservation management actions (however described) in the FFMP:
 - enhanced habitat for biodiversity
 - reduced impacts to flying-foxes
 - regional conservation of flying-foxes and their ecosystem services
 - reduced impacts to people living near a flying-fox camp

- improved public perception of flying-foxes
- (B) consult with the Department on any proposed amendments to the Class of Actions identified in the FFMP and obtain the approval of the Minister before incorporating those amendments into the FFMP;
 - (C) undertake monitoring of the Grey-headed Flying-fox camp as set out in the FFMP;
 - (D) support quarterly surveys by NSW OEH of the Grey-headed Flying-fox for the National flying-fox monitoring program; and
 - (E) participate in research to improve knowledge of Grey-headed Flying-fox ecology.
- (ii) The Department will:
 - (A) finalise and publish the National Recovery Plan for the Grey-headed Flying-fox.
 - (iii) Both Council and the Department must:
 - (A) develop and publish information to improve community understanding of, and capacity to manage the Grey-headed Flying-fox and its habitat.
 - (iv) Council and the Department will pursue options for:
 - (A) supporting research into the ecology and management of the Grey-headed Flying-fox; and
 - (B) identifying and promoting the protection of key foraging and roosting habitats used by the Grey-headed Flying-fox.

5.2 Class of Actions

The Class of Actions is any action in relation to the management of Grey-headed Flying-fox and its Habitat:

- (a) that is identified in the FFMP; and
- (b) that is carried out in accordance with the mitigation standards described in Part 3 of the EPBC Act Flying-fox Guidelines.

Note: If Council wishes to undertake actions that fall outside the Class of Actions described above, Council should consider the need to refer the actions to the Department for a decision under the EPBC Act.

6. Declaration

- (a) Pursuant to section 306A of the EPBC Act and subject to clause 4(a)4(a), the Minister declares that actions in the Class of Actions do not require approval under Part 9 of the EPBC Act for the purposes of sections 18 and 18A of the EPBC Act.

7. Review and reporting of this Agreement

7.1 Review

- (a) A Review of the operation of this Agreement, including the Schedules, must be undertaken by the parties:
 - (i) if Council revises or amends the FFMP;
 - (ii) when the National Recovery Plan for Grey-headed Flying-fox is finalised; and
 - (iii) in any case-at least once every five years from the commencement of this Agreement.
- (b) If a Review is to be undertaken the parties will agree in writing on:
 - (i) the terms of the Review;
 - (ii) the scope of the Review; and
 - (iii) the date by which the Review will be completed.
- (c) A Review may be linked to a Report requested under clause 7.2.
- (d) Failure to undertake the Review contemplated by clause 7.1(a) does not invalidate this Agreement.
- (e) This clause does not limit the Minister's powers to terminate or vary this Agreement under section 308 of the EPBC Act.

7.2 Reporting

- (a) Council must publish the FFMP on the Council website within three months of the commencement of the Agreement.
- (b) Council must, within 20 Business Days of a request in writing, provide the Department with a report on the operation of this Agreement. The Report will not be requested more than once within a 12 month period. The Department may publish the Report on its website.
- (c) Council must provide the Department with a Report on the effectiveness of the FFMP in achieving its objectives every five years.

7.3 General

Subject to any written agreement to the contrary, each party must bear its own costs of any Review undertaken, and Reports prepared, pursuant to clauses 7.1 and 7.2.

8. Dispute resolution

8.1 Dispute resolution

- (a) If a dispute arises in relation to the conduct of this Agreement, a party must comply with this clause 8.1 before starting court proceedings (except proceedings for urgent interlocutory relief). After a party has sought or obtained urgent interlocutory relief, that party must comply with this clause 8.1.
- (b) The parties agree that any dispute arising during the course of this Agreement will be dealt with as follows:
- (i) either party may give written notice of a dispute to the other party which will state that it is a notice under this clause and will specify the details of the dispute concerned;
 - (ii) management representatives of each of the parties will endeavour in good faith to agree upon a resolution of the dispute;
 - (iii) if the management representatives fail to reach a solution within 10 Business Days of receipt of a notice of dispute (or a timeframe agreed in writing between the parties), the dispute will be taken to senior executive representatives of each of the parties;
 - (iv) senior executive representatives will endeavour in good faith to agree upon a resolution of the dispute;
 - (v) if the senior executive representatives fail to resolve the dispute within 10 Business Days (or other timeframe agreed in writing between the parties), the dispute will be taken to the:
 - (A) Chief Executive Officer of Council; and
 - (B) Secretary of Department,who will endeavour to reach agreement regarding the dispute.
- (c) If agreement cannot be reached in accordance with clause 8.1(b), the parties must endeavour to resolve any dispute under this Agreement by mediation or other alternative dispute resolution method before they commence legal proceedings (except proceedings for urgent interlocutory relief).

8.2 Costs

Each party to a dispute must pay its own costs of complying with this clause. The parties to the dispute must equally pay the costs of any mediator or other alternative dispute resolution provider.

8.3 Breach of this clause

If a party to a dispute breaches clause 8.1 to 8.2, the other party does not have to comply with those clauses in relation to the dispute.

9. Termination or variation

9.1 Termination by agreement

This Agreement may be terminated by agreement between the Minister and Council in accordance with section 308(3)(a) of the EPBC Act.

9.2 Termination or variation by order

- (a) Notwithstanding any other provision of this Agreement, this Agreement may be terminated or varied by the Minister by order published in the *Gazette* in accordance with section 308(4) of the EPBC Act.
- (b) If the Minister varies this Agreement by an order made under section 308(4) of the EPBC Act, this Agreement may be terminated by Council in accordance with section 308(7) of the EPBC Act.
- (c) In accordance with section 308(8) of the EPBC Act, if the Agreement is terminated or varied by an order, Council is not entitled to any compensation in respect of the termination or variation.

9.3 Variation

Subject to clause 9.2 and the Minister's rights under section 308 of the EPBC Act, no agreement or understanding varying or extending this Agreement is legally binding upon a party to this Agreement unless the agreement or understanding is in writing and signed by the parties.

10. Notices

10.1 Service of notices

- (a) A party giving notice or notifying under this Agreement must do so in English. The notice must be given in writing or by Electronic Communication:
 - (i) directed to the other party's contact person at the other party's address (as set out in Item 5 of the Agreement Details or subsequently notified by the first party); and
 - (ii) hand delivered or sent by prepaid post or Electronic Communication to that address.
- (b) A party to this Agreement must ensure it provides current and correct contact details to the other party.

10.2 Effective on receipt

A notice given in accordance with clause 10.1 takes effect when it is taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the sixth Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia); or
- (c) if sent by Electronic Communication, at the time that would be the time of receipt under the *Electronic Transactions Act 1999* (Cth), but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the notice is taken to be received at 9.00am on the next Business Day.

11. General clauses

11.1 Rights and powers of the Minister

The rights and powers of the Minister under this Agreement are in addition to any rights and powers the Minister has under the EPBC Act.

11.2 Ownership of Agreement

All copyright and other intellectual property rights contained in this Agreement remain the property of the Commonwealth.

11.3 Approvals and consents

Except where this Agreement expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

11.4 Assignment and novation

A party may only assign its rights or novate its rights and obligations under this Agreement with the prior written consent of the other party.

11.5 Costs

A party must pay its own costs of negotiating, preparing and executing this Agreement.

11.6 Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

11.7 Entire agreement

This Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

11.8 Further action

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and any transaction contemplated by it.

11.9 Severability

A term or part of a term of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining terms or parts of the terms of this Agreement continue in force.

11.10 Waiver

Waiver of any provision of or right under this Agreement:

- (a) must be in writing signed by the party entitled to the benefit of that provision or right; and
- (b) is effective only to the extent set out in any written waiver.

11.11 Relationship

- (a) The parties must not represent themselves, and must ensure that their officers, employees, agents and subcontractors do not represent themselves

as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.

- (b) This Agreement does not create a relationship of employment, agency or partnership between the parties.

11.12 Governing law and jurisdiction

This Agreement is governed by the law of the Australian Capital Territory and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

Schedule 1 – Agreement Details

Item No.	Description	Clause reference	Details
1.	Department details	1.1	Commonwealth of Australia as represented by the Department of the Environment ABN 34 190 894 983
2.	Department Representative	1.1	Name: Matt Cahill Position: First Assistant Secretary, Environment Standards Division Phone: 02 6274 1077 Email: matt.cahill@environment.gov.au
3.	Council details	1.1	Eurobodalla Shire Council ABN 47 504 455 945
4.	Council Representative	1.1	Name: Catherine Dale Position: General Manager Phone: 02 4474 1308 Email: catherine.dale@esc.nsw.gov.au
5.	Address for notices	10.1	Department: Kim Farrant Assessments (NSW, ACT) and Fuel Branch Department of the Environment Postal address: GPO Box 787, Canberra, ACT, 2601 Email: kim.farrant@environment.gov.au and epbc.referrals@environment.gov.au Council: Name: Deb Lenson Position: Divisional Manager Environmental Services Postal address: PO Box 99, Moruya, NSW, 2537 Email: Deb.Lenson@esc.nsw.gov.au

Schedule 2 – Flying-fox Management Plans for Grey-headed Flying-fox at Batemans Bay, NSW

Water Gardens Grey-headed Flying-fox Camp Management Plan 2015

Batemans Bay Flying-fox Camp Dispersal Plan 2016-2019

Batemans Bay Grey-headed Flying-fox Management Plans: Supplement August 2016


Execution page

EXECUTED as a Conservation Agreement under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

SIGNED on behalf of the **Commonwealth of Australia** as represented by the delegate of the Minister for the Environment and Energy

MATTHEW CAHILL
Name
FIRST ASSISTANT SECRETARY
Position

Signature
22/9/16
Date

Valerie Hush
Name of witness (print)
Executive Officer

Signature of witness
22/9/16
Date

SIGNED on behalf of the **Eurobodalla Shire Council** by an authorised representative

Catherine Dave
Name
GENERAL MANAGER
Position
CATHERINE DAVE
Signature
8/9/16
Date

KYLIE GREEN
Name of witness (print)
EXECUTIVE ASSISTANT

Signature of witness
8/9/16
Date