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New Koala Conservation Laws for Queensland

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1. Introduction

Koalas are regarded as an iconic species and are very popular with tourists to Australia, helping to generate tourist revenue over \$1 billion. The number of koalas in Queensland, once millions, is now estimated at between 100,000 to 300,000 animals.¹

The last three years has seen a series of koala law reforms in Queensland. The koalas in the South East Queensland bioregion were classified as “vulnerable” in 2004 reflecting the lowered population levels and various threats to that species. A draft Koala Conservation Plan was released for public comment in 2005, accompanied by the introduction of a temporary State Planning Policy for Koala Conservation, repealing the existing 1997 State Planning Policy. That temporary State Planning Policy was then superseded by the release of the South East Queensland Regional Plan containing *Interim Guidelines: Koalas and Development*.

The pace of change to koala protection law continues, with commencement of the *Nature Conservation (Koala) Conservation Plan 2006 and Management Program 2006–2016* on 2 October 2006. Given the threats to koalas particularly in the South East of Queensland, the new plans for koala conservation and management in Queensland will be examined with interest.

2. Statutory framework of Conservation Plans

2.1 Processes for Preparation of Conservation Plans

Conservation plans are made under the *Nature Conservation Act 1992* (“NCA”). The Act contains a process for public notification of the draft plan and Ministerial consideration of public submissions prior to preparation of the final plan by the Minister.² A final conservation plan does not have effect until it has been approved by the Governor in Council.³ The final conservation plan is subordinate legislation,⁴ and must be kept open for public inspection.⁵ The Minister must review the operation of each conservation plan not later than ten years after its approval.

¹ Page 6 Nature Conservation (Koala) Management Program 2006

² Sections 112-119 *Nature Conservation Act 1992*

³ Section 119(1) *Nature Conservation Act 1992*

⁴ Section 119(2) *Nature Conservation Act 1992*

⁵ Section 119(3) *Nature Conservation Act*, those places for public inspection are at the Department’s head office, each regional office & such other places as the chief executive considers appropriate.

2.2 *Content of Conservation Plans*

A final conservation plan for wildlife or a class of wildlife must be consistent with the management principles for the class of wildlife.⁶ It may provide for the State to be divided into wildlife districts.⁷ The final conservation plan replaces the declared management intent for the wildlife or class of wildlife.⁸

A conservation plan may make provisions about matters for which a regulation may be made under the *NCA*, for example, prescribing offences for contravention of the plan, and fixing a maximum penalty for a fine. A conservation plan may make provision about the use or development of land, and activities, in an area identified under the plan as, or including, a critical habitat or area of major interest.⁹

2.3 *Conservation Plans and Planning Schemes*

If there is any conflict between a conservation plan and a planning scheme (whether made before or after the plan) the plan prevails over the planning scheme.¹⁰ A local government must not issue or give any approval for the use of land that is inconsistent with the regulation or plan.¹¹

2.4 *Conservation Plans and Compensation*

If a conservation plan is approved for an area identified under the plan as a critical habitat or an area of major interest and a land holder's interest in land is injuriously affected by a restriction or prohibition imposed under the plan on the land holder's existing use, the landholder is entitled to be paid compensation which is claimed through the Land Court.¹²

3. **Koala Plans**

3.1 *Koala Plans*

The *Nature Conservation (Koala) Conservation Plan 2006* and *Management Program 2006-2016* ("Koala Plans") were published on 1 July 2006. The *Nature Conservation (Koala) Conservation Plan 2006* ("Koala Conservation Plan") commenced operation on 2 October 2006. The South East Queensland Regional Plan 2005-2026 provides¹³ that the Koala Plans once adopted supercede the Interim Guidelines: Koalas and Development referred to in the South East Queensland Regional Plan.

⁶ Section 118(1) *Nature Conservation Act 1992*

⁷ Section 118(2) *Nature Conservation Act 1992*

⁸ Section 121 (2) unless the plan declares that this subsection does not apply to the plan.

⁹ Section 112(5)(b) *Nature Conservation Act 1992*

¹⁰ Section 122 *Nature Conservation Act 1992*

¹¹ Section 123 (2) *Nature Conservation Act* provides in full A local government must not issue or give any approval, consent, permit or other authority for a use of, or a development on, the land that is inconsistent with the regulation or plan. The land includes 123 (1)(b) an area identified under a conservation plan as, or including, a critical habitat or an area of major interest.

¹² Section 126 *Nature Conservation Act 1992*. Note that compensation is not payable if it has already been paid for the restriction or prohibition or one to the same effect. The land holder's interest is not injuriously affected if the restriction or prohibition under the conservation plan is the same or to the same effect as a provision of another law applying to the land immediately before the commencement of the plan.

¹³Section 2.2 notes, SEQ Regional Plan 2005-2026

3.2 *Broad Contents of the Koala Plans*

The Koala Plans comprise a published document of 125 pages, including nine sections¹⁴ containing ten management approaches at its heart. The bulk of that document is the Management Program, designed to give effect to the Conservation Plan, which is a 20 page document at the back of the published document. Of those ten management approaches, it is mainly the regulatory approach concerning development and land use which will be discussed in this paper.

The Koala Plans provides for and refers to a number of legal tools and initiatives. The Environmental Protection Agency (“EPA”) is now a concurrence agency under the *Integrated Planning Act 1997* for the purposes of the *Nature Conservation Act 1992*¹⁵ with its role applying in Koala Conservation and Koala Sustainability Areas (see below). The Koala Plans include at Section 5 “Koala conservation criteria” to be applied for development assessment.

3.3 *How the Koala Plans will control Development- Three Districts*

The Koala Conservation Plan creates three Koala Districts within Queensland, A, B and C where the threats to koala populations and so protective requirements vary. Map 1 in the Koala Plans shows those Koala Districts. The following summarise provisions pertaining to those districts.

Koala District A contains the highest koala densities of the three districts but also the greatest threats to koalas of the three districts. It corresponds to the SEQ Region under the SEQ Regional Plan, and comprises 18 local government areas in the southern portion of the South-East Queensland Bioregion¹⁶. The District is divided into three Koala Habitat Areas¹⁷ which consists of Koala Conservation Areas, Koala Sustainability Areas and Urban Koala Areas. The Koala Conservation Criteria found at section 5 of the Koala Plans apply to assessment of proposed community infrastructure designations. The Koala Conservation Criteria also apply to the assessment of certain listed development activities¹⁸ within certain types of development in those Koala Habitat Areas. Additionally, for the Koala Conservation Criteria to apply to the listed development activities, those certain types of developments must also be made assessable by schedule 8 of the *Integrated Planning Act 1997*, by local government planning schemes or by the regulatory provisions of the SEQ Regional Plan.

The Koala Conservation Criteria comprise overall outcomes and various tables of assessment criteria which criteria must each be met and which are to be read in conjunction with the overall outcomes. Of the three koala habitat areas within Koala district A, koalas within Urban Koala Areas receive the lowest form of protection by those Criteria and the host of exemptions which apply. The strongest protection for Koalas is to be found in the overall outcomes and criteria that apply to general uncommitted development (where development is not a development commitment, see below), in the Koala Conservation Area and Koala Sustainability Area. In those areas, for example, relevant overall outcome (a) provides “Koalas in the area are protected”, (b) “Koala habitats are protected, maintained and their integrity enhanced” and (c) “The ability of koalas to

¹⁴ The nine parts comprise 1. Introduction; 2. Koala Biology and ecology; 3. Framework 4. Management approaches; 5. Koala Conservation criteria for development assessment 6. Koala Policies 7 Glossary 8. Bibliography /References and 9 *Nature Conservation (Koala) Conservation Plan 2006*.

¹⁵ Schedule 2, *Integrated Planning Act Regulation 1998*

¹⁶ Page 30 Koala Plans

¹⁷ There is also a fourth category, Koala Living Area, referred to in the Koala Plans, page 13. It does not form part of the Koala Habitat Areas.

¹⁸ Table 3, Development to which the criteria apply, page 31 Koala Plans.

move into, within and out of the area is maintained”. In those areas, for example, there are criteria such as strong restrictions on clearing specified larger trees and no development for urban activities. However compliance with those outcomes is not required for uncommitted extractive industry development in a key resource area, its outcome is “a net benefit to koalas or koala habitat”. Compliance with the outcomes is not required for uncommitted community infrastructure development that justifies its location in the areas on the basis of overriding need in the public interest, its required outcome is “a net benefit to koalas or koala habitat”.

The definition of “development commitment”¹⁹ includes development with a current development approval, but also certain material changes of use, reconfiguring of lots and building and operational work. For example if the proposed development was a material change of use outside the Urban Footprint under the SEQ Regional Plan it is a “development commitment” if the material change of use was clearly consistent with the regulatory provisions of the SEQ Regional Plan and with the purposes of codes (or equivalent policy intents) of the zone and any applicable overlays in the relevant planning scheme.

Koala District B comprises 18 local governments in the northern portion of the South East Queensland Bioregion, the rest of South East Queensland Bioregion not included in Koala District A. The Koala Conservation Criteria do not apply to assessment of development applications in this District. It is stated to contain habitat in areas zoned for rural purposes.

Koala District C contains the remaining 77 local government areas where koalas are found. The Koala Conservation Criteria do not apply to assessment of development applications in this District.

3.4 Discussion of Regulation of Development

The Koala Conservation Plan prevails over planning schemes whether made before or after the Koala Conservation Plan (see compensation, above). However even in Koala District A, where koalas are under most threat, the Koala Conservation Plan has adopted a broad definition of “committed development”, and does not strongly regulate this type of development, in an apparent attempt to avoid paying compensation. The Koala Conservation Plan even singles out uncommitted community infrastructure and uncommitted extractive industry development in key resource areas for softer regulation with respect to koala protection than that which is applied to other types of uncommitted development. This shows that continued supply of extractive industry materials for development is rated as of greater importance than koala species protection. Those type of exceptions are at best unhelpful for the medium to long term survival of koalas in Koala District A.

The State Minister for the Environment has refused requests to use powers under the *Integrated Planning Act 1997* to “call in” and refuse or condition development applications that impact on Koalas.²⁰ This has placed the burden of running appeals to protect habitat against development on poorly resourced community groups. So it is positive that the Environmental Protection Agency now has a concurrence role in relation to many development applications in at least Koala Conservation Areas and Koala Sustainability Areas, instead of mere advisory powers, as exercise of concurrence powers is less controversial politically than Ministerial call ins. However given the reluctance of the Minister to call in developments to protect koalas in the past, it is disappointing

¹⁹ Definition of Development commitment, and of Uncommitted development, Annex 2, Glossary, Koala Plans. “Uncommitted development” is development that is not a development commitment”.

²⁰ For example, during 2006 concerning developments at German Church Road and 401 Redland Bay Road in the Redland local government area.

that concurrence powers do not extend outside those areas. Thus local government still bears a burden to undertake further mapping to identify additional koala habitat.

4. Conclusion

The Koala Plans are a very welcome initiative and includes many excellent strategies and ideas for increasing protection of the koala by regulatory and non-regulatory cooperative efforts. However the large number of qualifications to the extent and nature of regulation to protect koalas through the development assessment process are disappointing. Given the high growth and development levels in South-East Queensland, the future for the Koala in that area is still unpromising. Roads²¹ and extractive industries are being expanded in important koala areas to cater for the increased development. The Koala Plans have the legislative framework to be bolder and need to be amended to better protect Urban Koala Areas and to remove the qualifications that allow certain developments destroying koala habitat to proceed in Koala Conservation Areas and Koala Sustainability Areas.

To improve the outlook for species protection in general in Queensland, the EPA needs more statutory power to regulate development to protect biodiversity.

If the poor outlook for koalas is to be improved, it is necessary for local governments to take more initiatives to protect koala habitat. The State Minister for the Environment needs to take a more assertive role in calling in and refusing inappropriate development applications that are detrimental to koalas, which has not happened in the past. The Environmental Protection Agency will need to exercise its concurrence jurisdiction assertively and to be assisted by sufficient resources.

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²¹ For example Redland Bay Road is to be upgraded to a four lane Road. It passes through important koala habitat.