



Environmental  
Defenders Office

## **Submission to the Draft Koala Habitat Protection Guideline**

**30 March 2020**

## About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

**[www.edo.org.au](http://www.edo.org.au)**

### Submitted to:

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## INTRODUCTION

The Environmental Defenders Office (**EDO**) is a not-for-profit community legal centre specialising in public interest environmental law. While we welcome the opportunity to make a submission on the Draft *Koala Habitat Protection Guideline* (**the Draft Guideline**), we are generally disappointed with the rollout of *State Environmental Planning Policy (Koala Habitat Protection) 2019* (**Koala SEPP 2019**) and the missed opportunity to strengthen protections for koala habitat in NSW.

The Koala SEPP 2019 was introduced following a review of the former *State Environment Planning Policy 44 – Koala Habitat Protection* (**SEPP 44**) and public exhibition of an Explanation of Intended Effect (**EIE**) for a revised Koala SEPP in late 2016. EDO made a submission to the review of SEPP 44 and EIE outlining our key concerns with the operation of the SEPP and making recommendations for improvement.<sup>1</sup>

Despite the delay since the review of SEPP 44, and our recommendation that the Government consult on the text of a draft SEPP, the Koala SEPP 2019 was made without any additional public consultation. Further the Koala SEPP 2019 commenced operation on 1 March 2020, before public consultation on the Draft Guideline (which underpins the Koala SEPP 2019) was finalised. Similarly, a new Ministerial Direction, which is expected to outline requirements for councils preparing planning proposals to identify areas of core koala habitat and zone the land Environmental Protection, or include provisions that control the development of the land to consider impact on koalas and their habitat, has not yet been seen.<sup>2</sup>

In providing feedback on the Draft Guideline, where relevant we have also raised concerns regarding the interaction between the Draft Guideline and the Koala SEPP 2019, and the operation of the Koala SEPP 2019 more broadly. We have also outlined our ongoing concerns regarding the protection of koala habitat in NSW.

To that end, our submission is structured as follows:

### **1. Feedback on the Draft Guideline, including:**

- a) Development of the Guideline**
- b) Definition of core koala habitat**
- c) Definition and identification of native vegetation**
- d) Compensatory measures (offsetting)**
- e) Development and application of *Koala Development Application Map* and *Site Investigation Area for Koala Plans of Management Map***
- f) Development application process under the SEPP - application of Tier 1 and Tier 2 criteria**
- g) 1 hectare requirement**

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<sup>1</sup> See EDO Submission on the Review of the Koala SEPP (State Environmental Planning Policy 44 – Koala Habitat Protection), January 2017, available at: [https://www.edonsw.org.au/submission\\_on\\_the\\_koala\\_sepp\\_review\\_state\\_environmental\\_planning\\_policy\\_44\\_koala\\_habitat\\_protection](https://www.edonsw.org.au/submission_on_the_koala_sepp_review_state_environmental_planning_policy_44_koala_habitat_protection)

<sup>2</sup> See Department of Planning, Industry and Environment, *State Environmental Planning Policy (Koala Habitat Protection) 2019 – Frequently Asked Questions*, available at <https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/state-environmental-planning-policy-koala-habitat-protection-2019-faqs-2019-12-20.pdf?la=en>

- h) Koala Plans of Management**
- i) Template for Koala Assessment Reports**
- j) Survey methods for core koala habitat**

## **2. Ongoing concerns regarding the protection of koala habitat in NSW**

Based on our analysis, the interaction between the Koala SEPP 2019, associated maps and Draft Guideline is likely to result in a greater amount of land captured by the operation of the Koala SEPP 2019 and identified as core koala habitat. Ultimately however, there is no real increased protection for land that is identified as core koala habitat. Discretionary decision-making, inconsistent standards across local government areas (**LGAs**), and the availability of compensatory measures such as offsetting, mean that the clearing of core koala habitat will continue under the Koala SEPP 2019.

### **1. FEEDBACK ON THE DRAFT GUIDELINE**

The Draft Guideline is critical to the implementation of Koala SEPP 2019. Its principal functions are to set out requirements for the development of koala plans of management (**KPoMs**) and requirements for the preparation and assessment of development applications where the SEPP applies but a KPoM is not in place.

#### **a) Development of the Guideline**

We note that there are no formal requirements for developing the Guideline set out in the Koala SEPP 2019 (e.g. no requirements for community consultation or peer review). Although the Draft Guideline is currently on public exhibition, there is no requirement that any future updates to the Guideline be put on public exhibition. There is also no detail about the process for the anticipated 24 month review of the Guideline.<sup>3</sup> To improve transparency, and ensure that the Guideline reflects the best-available science, we would recommend that any future substantial updates to the Guideline also be subject to public consultation. We also suggest that the Draft Guideline and any substantial updates are subject to peer review.

#### **b) Definition of core koala habitat**

We generally welcome the updated definition of core koala habitat and updated list of feed tree species. However, the requirement within part (b) of the definition that “*koalas have been recorded as being present in the previous 18 years*” seems arbitrary and it is unclear why 18 years has been adopted. The Draft Guideline could better explain this, including how it may relate to ‘generational persistence analysis’ which has been successful in identifying the likely presence of resident and/or source populations, by recognising repeated records of koalas within a localised area over overlapping generational time spans.

#### **c) Definition and identification of native vegetation**

The Draft Guideline makes reference to native vegetation, but this is not defined in the Draft Guideline. Part 2 of the Draft Guideline uses the term native vegetation in the context of the land management regime under the *Local Land Services Act 2013* (**LLS Act**), and therefore it could be assumed that in that

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<sup>3</sup> The Draft Guideline proposes that the Guideline be reviewed within 24 months of publication on the Department’s website and updated if necessary (see Draft Guideline, p 7).

context native vegetation should be understood to have the same meaning as section 60B of the LLS Act. The term native vegetation is also used in Part 3 of the Draft Guideline for the purpose of establishing whether proposed development would fall into Tier 1 or Tier 2. Again it is unclear what constitutes native vegetation for the purpose of Part 3 of the Draft Guideline, and whether this would include native grasslands (which can provide important habitat for koalas, in the form of isolated trees that are preferred feed trees). This should be clarified in the finalised Guideline. As discussed below, it is also unclear if and/or how native grassland has been incorporated into the two maps made under the Koala SEPP 2019.

#### **d) Compensatory measures (offsetting)**

Generally, EDO is concerned that compensatory measures (such as offsetting) are available for proposed clearing of koala habitat. EDO has ongoing concerns that the current Biodiversity Offsets Scheme (**BOS**) in NSW does not reflect best-practice, and is of the view, that in some circumstances (e.g. where there are serious or irreversible impacts) biodiversity offsetting should simply not be allowed.<sup>4</sup> The biodiversity offsetting regime also fails to provide appropriate mechanisms for monitoring and considering the cumulative impacts of clearing (and any subsequent offsetting) of koala habitat.

It is unclear how the Draft Guideline (particularly Principle 6) interacts with the Biodiversity Assessment Method (**BAM**) made as part of the BOS under the *Biodiversity Conservation Act 2016* (**BC Act**). Seven key planning principles have been developed to help define the criteria and requirements set out in this Guideline, including Principle 6 – “Use of compensatory (i.e., offsetting) measures only where they can be shown to meet the aim of the SEPP”.

In our view, the weak policy settings in the BAM which would allow core koala habitat to be cleared are inconsistent with the aim of the Koala SEPP 2019, which is to “encourage the conservation and management of areas of natural vegetation that provide habitat for koalas to support a permanent free-living population over their present range and reverse the current trend of koala population decline”.<sup>5</sup> Would the Draft Guideline operate to override the BAM where it can be shown that proposed offset measures, despite being allowed under the BAM, would be inconsistent with the Koala SEPP 2019?

If our laws are to truly protect koalas and their habitats then the approval process must not allow important koala habitat to be cleared and offset in exchange for money in the way that the current BAM allows. Rather, all development that has serious or irreversible impacts on core koala habitat must be refused. This should be reflected more broadly in NSW biodiversity conservation laws.

#### **e) Development and application of Koala Development Application Map and Site Investigation Area for Koala Plans of Management Map**

There is no public information explaining how the Koala Development Application Map (**KDA Map**) or Site Investigation Area for Koala Plans of Management Map (**SIA Map**) have been developed (e.g. what datasets have informed the maps, have native grasslands been included in the mapping, have the maps been ground-truthed etc). In contrast, the requirements for making the Native Vegetation

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<sup>4</sup> See, for example, EDO, *Technical submission on the Biodiversity Assessment Method and Mapping Method 2016*, June 2016, available at [https://www.edonsw.org.au/nsw\\_biodiversity\\_reform\\_package\\_2016](https://www.edonsw.org.au/nsw_biodiversity_reform_package_2016)

<sup>5</sup> *State Environmental Planning Policy (Koala Habitat Protection) 2019*, clause 3.

Regulatory Map under the LLS Act are much more prescriptive about how that map is developed, including a requirement that the Environment Agency Head publish information about the scientific method used to prepare a native vegetation regulatory map.<sup>6</sup> We recommend that an explanation of the method used for developing the maps should be made publicly available, and a process for conducting ground-truthing audits of the maps should be developed to ensure accuracy.

While maps made under the Koala SEPP 2019 can be amended (clause 7, Koala SEPP 2019), there does not appear to be any formal mechanism for councils or third parties to request updates to maps if local surveys or new information identifies errors. This could be potentially limiting if the SIA Map is not reliable (e.g. if it has not been properly ground-truthed or becomes out-of-date), because the Draft Guideline (in line with clause 11(4) of the Koala SEPP 2019) provides that only land identified on the SIA Map can be identified as core koala habitat in a KPOM. In the case of the KDA Map, we recognise that under clause 9(2) of the Koala SEPP 2019 a landholder can obtain information from a suitable qualified expert showing that land is not core koala habitat. If that occurs (i.e. a suitable qualified expert provides information that land is not core koala habitat), we understand that the requirements of the Guideline would then not apply (however this is not explicit in the wording of clause 9 of the Koala SEPP 2019).

**f) *Development application process under the SEPP - application of Tier 1 and Tier 2 criteria***

We are concerned that the development assessment process outlined in Part 3 of the Draft Guideline (which applies where the KDA Map applies (or alternatively where a survey has identified the land as core koala habitat) and where there is no approved KPOM in place) is unclear and will be difficult to apply in practice. Further, it appears that the distinction between Tier 1 and Tier 2 development is also intended to avoid the unnecessary engagement of a suitably qualified and experienced person, yet appropriate assessment of some of the criterion for Tier 1, may require input from a relevant expert.

For example:

- It is our understanding that the Koala SEPP and *Koala Protection Habitat Guideline* applies to any landholdings captured by the map (whether the whole lot or only a portion is covered) (see p 4 of the Draft Guideline). We also understand this to mean that even if the proposed development footprint is not in an area captured by the map, the fact that a separate part of the landholding is captured by the map means the Koala SEPP would apply to that proposed development. This latter assumption is unclear and should be clarified in the Draft Guideline.
- The criterion for determining whether development has low or no impact on koalas or their habitat (Tier 1) may be difficult to apply in practice. In particular:
  - For the purpose of criterion 3, native vegetation should be defined and the definition should clarify whether this includes native grassland;
  - Whether or not the development footprint will impede movement between koala habitat is subjective and may require expert input; and
  - Criterion 5 advises that adequate mitigation measures such as those listed in Table 1 should be implemented as necessary in order for proposed development to be considered as Tier 1. However the identification of appropriate measures would require an initial

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<sup>6</sup> See LLS Act, Part 5A, Division 2.

assessment (presumably by an expert) of risks, and advice and decisions about appropriate measures. This criterion seems to contradict the intent of Tier 1. We recommend that Criterion 5 be removed from Tier 1 and that the mitigation measures in Table 1 be instead framed as mitigation measures for the purpose of addressing Principle 4 (and criterion 9 and 10) - *“Implement best practice measures for the management of identified risks to koalas”* in Tier 2.

**g) 1 hectare requirement**

The arbitrary threshold of 1 hectare for triggering SEPP 44 has been carried over to Koala SEPP 2019 in circumstances where a Koala PoM is not in place.<sup>7</sup> Excluding sites below 1 ha from the Koala SEPP leaves small koala habitat areas, particularly koala habitat in urban areas, without adequate protection. The 1 hectare requirement also contributes to cumulative impacts, and can reduce connectivity across the landscape by allowing small patches to be cleared.

**h) Koala Plans of Management**

The Draft Guideline indicates that KPoMs should establish a development assessment framework that defines the assessment pathways that are relevant to the development application (Draft Guideline, page 40). We understand this to be different to the development assessment process outlined in Part 3 of the Draft Guideline where a KPoM is not in place (i.e the Tier 1 and Tier 2 thresholds).

The Draft Guideline suggests that for development in core koala habitat, the Biodiversity Offsets Scheme will automatically apply, but does not explain how this interacts with Principle 6 of the Draft Guideline (see our comments in relation to offsets - compensatory measures - above).

The Draft Guideline also suggests that the development assessment framework may be different in different council areas. This may lead to inconsistent development controls and outcomes across council areas. The role of the Koala SEPP 2019 and the Guideline should be to provide, where possible, consistent requirements for development assessment on core koala habitat across the State, particularly as it is envisaged that KPoMs be rolled out across all relevant LGAs, and development assessment on core koala habitat is undertaken less frequently on a case-by-case basis. For example, the Guideline should establish a set of development standards that could be applied consistently across the State for development being carried out on core koala habitat. Specifically, the list of suggested management measures identified in Table 1 in Part 3 (which are suggested in the context of identifying adequate mitigation measures for Tier 1 development on land for which a KPoM is not in place) could be replicated as requirements that must be adopted by KPoMs for development being undertaken in core koala habitat.

**i) Template for Koala Assessment Reports**

We support the inclusion of the template Koala Assessment Report in the Draft Guideline. Providing a template will promote transparency and consistency of assessments.

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<sup>7</sup> See clauses 8 and 9 of the new Koala SEPP and page 3 of the Draft *Koala Habitat Protection Guideline*.

### ***j) Survey methods for core koala habitat***

It is our understanding that the SIA Map should be utilised by councils to assist them in identifying core koala habitat for the purpose of developing their KPoMs. This should reduce the amount of surveying that individual councils will need to undertake and remove previous barriers to the uptake of KPoMs (i.e. Councils won't have to survey an entire LGA). To that end, the Draft Guideline should make it clear that the survey methods in Appendix C do not need to be applied over the entire LGA, but only to areas identified in the SIA Map in order to identify core koala habitat for the purpose of subsequent identification in a KPoM or where relevant local information suggests that core koala habitat has been omitted from the SIA Map.

## **2. ONGOING CONCERNS REGARDING THE PROTECTION OF KOALA HABITAT IN NSW**

EDO recognises that the Koala SEPP 2019 implements a number of key changes following the review of SEPP 44. In particular:

- Most significantly, the new Koala SEPP contains an updated definition of core koala habitat and removes the problematic concept of 'potential koala habitat', instead relying on mapping (a new KDA Map and new SIA Map) to initially identify koala habitat; and
- The new Koala SEPP updates the list of feed tree species in Schedule 2, used to help identify koala habitat, from 10 species to 123 species, categorised into 9 distinct regions.

The updated definition of core koala habitat and updated list of feed tree species means that more area is likely to be identified as core koala habitat. However, as outlined below, the new Koala SEPP still has limited application.

Other key changes include removing the requirement for site specific plans of management (in instances where a comprehensive KPoM is not in place), instead requiring decision-makers to take into account new standard requirements in the *Koala Habitat Protection Guideline*. Provisions relating to how local environment plans and other planning instruments should give effect to protection to koalas are moved from the SEPP to a new Ministerial Direction (which is yet to be seen). The application of the Guideline, discussed above, will be critical to the success of the new Koala SEPP.

Despite these key revisions, many of EDO's key concerns have not been addressed by Koala SEPP 2019. For example:

- ***No areas of koala habitat are off-limits to clearing or offsetting*** - Despite declining koala numbers and the devastation caused by this summer's bushfires, NSW laws still allow koala habitat to be cleared with approval. Rather than including a mechanism to prohibit the clearing of core koala habitat, the Koala SEPP 2019 simply requires decision-makers to ensure development approvals are consistent with KPoMs, or if a KPoM is not in place, that the (yet-to be-finalised) Guideline be taken into account. If our laws are to truly protect koalas and their habitats then the approval process must not allow important koala habitat to be cleared and offset in exchange for money in the way that current the BAM allows. Rather, all development that has serious or irreversible impacts on core koala habitat must be refused.



- ***The requirement for councils to prepare Comprehensive KPoMs remains voluntary*** - Due to the slow uptake by councils (only 5 comprehensive KPoMs have been finalised since SEPP 44 commenced in 1995),<sup>8</sup> EDO has previously recommended that the preparation of comprehensive KPoMs should be mandatory (i.e. the SEPP require that draft KPoMs be prepared and exhibited within a particular timeframe). While the new SIA Map will assist councils to prepare a KPoM, the lack of incentives or mandatory requirements to prepare KPoMs means that uptake may not improve. Increased implementation of KPoMs is particularly important for meeting the aims of the SEPP, ensuring consistent application of the key planning principles, and reducing inconsistent application of the Guideline.
- ***The Koala SEPP 2019 still only applies to limited types of development*** - As was the case with SEPP 44, Koala SEPP 2019 still only applies to council-approved development. This means that Koala SEPP 2019 does not apply to the wide range of development and activities that can impact on koala habitat including complying development, major projects (State significant development and State significant infrastructure), Part 5 activities (e.g. activities undertaken by public authorities), and land clearing activities requiring approval under the LLS Act.
- ***Climate change considerations have been overlooked*** - The review of SEPP 44 provided an opportunity to incorporate requirements to identify and protect habitat and corridors that will support koalas' resilience to more extreme heat and natural disasters, even if there is no koala population in those areas now, however there is nothing in the Koala SEPP 2019 that specifically addresses climate change.
- ***Monitoring and compliance requirements have not improved*** - There are no new requirements relating to monitoring, review, reporting and compliance in Koala SEPP 2019.

Beyond the scope of the Koala SEPP 2019, EDO has also expressed concerns about the failure of NSW laws more broadly to adequately protect koala populations and habitat. For example, our submission<sup>9</sup> to the NSW Upper House Inquiry into koala populations and habitat in NSW<sup>10</sup> examines how not only the NSW planning system, but also public and private forestry and land management (land clearing) laws in NSW fail to provide adequate protections for koala habitat.

Therefore, while some improvements have been made by the introduction of the Koala SEPP 2019, overall many concerns remain and the Koala SEPP 2019 is unlikely to result in improved outcomes for koalas.

Until our laws are strengthened to truly limit or prohibit the destruction of koala habitat – koala populations and their habitat will continue to be at risk and koala numbers will continue to decline in NSW, possibly to the point of local extinction.

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<sup>8</sup> There are only approved plans for five council areas, and a further nine Councils who have drafted or undertaken koala habitat studies, see <https://www.environment.nsw.gov.au/topics/animals-and-plants/native-animals/native-animal-facts/koala/koala-conservation>

<sup>9</sup> EDO, *Submission to the Inquiry into koala populations and habitat in New South Wales*, 9 August 2019, available at <https://www.edo.org.au/publication/inquiry-into-koala-populations-and-habitat-in-nsw/>

<sup>10</sup> For more information on the Upper House Inquiry into koala populations and habitat in NSW, see <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536>