



KOALA EVIDENCE IN DECISION MAKING PROCESSES

Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).

While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

This factsheet was last updated on 26 June 2023

Koala evidence in NSW environment and planning decisions

Overview

Under NSW environment and planning laws, there are a range of decisions that may impact on koalas. For example:

- Decisions to approve or refuse development under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
- Decisions to rezone land under the EP&A Act.
- Decisions to develop and approve a Koala Plan of Management under Chapter 3 and Chapter 4 of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (Koala SEPP).
- Decisions about controlled actions under the Federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) (Cth).

The requirements for decision-making will be different depending on the type of decision being made, the legal process to be followed and the specific individual circumstances.

To learn more about these specific legal processes, refer to EDO Factsheets listed in the [Additional Resources](#) section below.

Do koalas need to be considered in decision making?

Legal requirements will depend on specific individual circumstances. For example:

- In some cases, the law will explicitly require that koalas be considered (e.g. in circumstances where the Koala SEPP applies).

- In other cases, koalas may need to be considered as part of general obligations to, for example, consider impacts on threatened species, consider the principles of ecologically sustainable development, consider the public interest etc.

What evidence about koala needs to be considered?

Legal requirements will depend on specific individual circumstances. For example:

- In some cases, rules or policies may refer decision-makers to specific information (e.g. the Tweed Coast Comprehensive Koala Plan of Management,¹ in setting out the process for reviewing the Plan, requires an analysis of any clustering of recent koala records sourced from public observations, the Wildlife Atlas and Friends of the Koala records; the NSW Government's *Guidance to assist a decision-maker to determine a serious and irreversible impact*² directs people to the Threatened Biodiversity Data Collection housed in BioNet).
- In other cases, the law is not specific about what information about koalas needs to be considered. In these circumstances, information about koalas may be put before decision-makers in various ways and the decision-maker can (and may be compelled to) consider that information in the decision-making process.

The way information and evidence are considered by decision-makers is set out in the section on [Legal Decision-Making](#) below.

Ways information can get before decision-makers

In general, there are a number of ways that information can get before decision-makers.

Agency briefs

- General briefs: The relevant agency (e.g. council, Department) will likely brief decision-makers from time-to-time about relevant issues pertaining to their work. General agency briefs are unlikely to be governed by a specific legal process and therefore do not have specific requirements about evidence or information.
- Decision briefs: Briefs intended to inform specific decisions are likely to address specific statutory requirements, including mandatory relevant considerations, and include any specific information or evidence required by law (e.g. prescribed assessment reports, formal submissions, relevant standards (e.g. noise standards) etc.)

¹ <https://www.tweed.nsw.gov.au/files/assets/public/documents/environment/native-plants-and-wildlife/tweed-coast-comprehensive-koala-plan-of-management.pdf>

² <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/guidance-decision-makers-determine-serious-irreversible-impact-190511.pdf>

Assessment reports

Many environment and planning laws require specific reports to be prepared and considered by the decision-maker, including biodiversity development assessment reports, environmental impact assessments or review of environmental factors. The proponent is often responsible for providing assessment reports, and commissions the assessments from qualified experts. The legislation is likely to also specify what information must be included in that report, but to a lesser extent the source of information.

Formal submissions

Key decision-making processes often include the process of public consultation and members of the community are invited to make a submission. In general, there is no prescribed format for making a submission and the person making a submission can include whatever information they like to support their submission.

Informal submissions and letters

Anyone may decide to write to a decision-maker outside of a formal process. Such submissions may be in the form of letters and short documents, often seeking to proactively raise issues with politicians and decision-makers. The extent to which a decision-maker is legally required to consider an informal submission may be more limited, however putting information before a decision-maker in this way will make it harder for them to argue they were not aware of certain information.

Expert evidence

Expert evidence refers to information put together by an expert. It may rely on desktop analysis of existing data available to the expert, surveys undertaken by the expert, or personal expert opinion.

In addition to expert environmental assessment reports that may be required as part of the process, there are other ways expert evidence can get before the decision-maker. For example:

- A member of the community may commission (paid or pro bono) an expert report to attach to a formal or informal submission; and/or
- A party to legal proceedings may seek to put expert evidence before the court.

Using evidence in formal and informal submissions

When making a submission, use evidence, case studies or stories to support your arguments and recommendations. Give specific examples that draw on your knowledge and experience. If you can, collect other stories that support your argument from others in the community. You can also draw on

the work of others, for example scientific publications, government documents or data, or the work of other organisations.

For more information see EDO Factsheet: [Submissions, Letters and Petitions](#)

Examples

Example 1 –Development Application

Rosie learns that a new development is proposed for her local suburb of Koala-town. Rosie is concerned about the impacts of the development on the local koala population. Rosie **writes a letter** to the local council to raise her concerns. The proponent submits a development application under Part 4 of the EP&A Act. The local council advertises the development application and invites people to make a submission. Rosie **lodges a submission**. In her submission Rosie refers to information she located on BioNet.³ The local council then assesses the development application. Under Part 4 of the EP&A Act, **Council is required to take into account a number of mandatory relevant considerations** when deciding whether to grant consent to the development the subject of the application. This includes the environmental impacts of the development and all submissions made during the consultation process.

Rosie also thinks that the proposal may be a controlled action under the EPBC Act, because it is likely to have a significant impact on koalas. It appears that the proponent has not referred the proposal to the Federal Environment Minister. Rosie **writes to the Federal Environment Minister** setting out her concerns and **asking the Minister to request the proponent refer the matter** for consideration as to whether it is a controlled action and requires approval under the EPBC Act.

Example 2 – Rezoning Application

A developer, Acme Pty Ltd, is seeking to rezone land in Koala-town. The Koala-town Conservation Society is concerned that the subject land contains important koala habitat and is part of an important koala corridor. The Society commissions a local ecologist to prepare **an expert report** that outlines the importance of the local koala population. The ecologist also undertakes an **on-ground survey** and includes the results in her report. The rezoning proposal is put on public exhibition. The Koala-town Conservation Society **lodges a submission** and attaches the expert report. The matter is put on the agenda for an upcoming council meeting. The Koala-town Conservation Society makes **a request to address council at the meeting**.

³ <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/nsw-bionet>

Legal decision-making

Overview

When, how and to what extent information and evidence is used in decision making will depend on individual circumstances (e.g. what is the decision to be made?, is there, and what is, the legal process for making that decision?, is there opportunity for community participation? etc.).

Generally, the law requires that before making a decision, the decision-maker:

must have taken into account all relevant information, excluded irrelevant matters, and reached a conclusion that, on the weight of the evidence, is reasonable in the circumstances.

Bates, G, Environmental Law in Australia 2010 (7th ed)

Mandatory and irrelevant considerations

Mandatory relevant considerations may be:

- Explicitly set out in the law itself, and may be *specific* (e.g. an environmental planning instrument, a biodiversity development assessment report, or a formal submission made during public consultation process) or general (e.g. the likely impacts of the development, the public interest, economic and social matters); or
- Implied from the subject matter, scope or purpose of the specific statute.

Similarly, irrelevant considerations are those are generally falling outside of the scope of the statute, and may be:

- Explicitly set out in the law itself; or
- Implied from the subject matter, scope or purpose of the specific statute.

Mandatory and discretionary decision making

The way in which a mandatory relevant consideration is taken into account by a decision-maker, will also depend on individual circumstances. For example:

- Where there are multiple, mandatory considerations the law may prescribe how these are to be weighted, or may provide the decision-maker with discretion in weighing up the various considerations.

- Similarly, in terms of exercising one’s power to make a decision, the law may require a decision-maker to make a certain decision (a mandatory decision), or it may give the decision-maker discretion in making a decision (discretionary decision).

In making any decision, decision-makers are generally required to exercise procedural fairness, including making reasonable decisions.

Additional Resources

For further information, including on legal processes under NSW environment and planning laws, see:

- EDO Factsheet: [How to have your say in developments across NSW](#)
- EDO Factsheet: [How to have your say in land-use planning in NSW](#)
- EDO Factsheet: [Clearing Vegetation on Rural Land](#)
- EDO Factsheet: [Clearing Trees on Urban Land and Environmental Zone](#)
- EDO Factsheet: [Submissions, Letters and Petitions](#)
- EDO Factsheet: [Land and Environment Court of NSW](#)

Evaluate this resource

EDO welcomes feedback on this factsheet. Your feedback will help us ensure we are providing useful information.

If you have any concerns or suggestions regarding this factsheet, please fill out the Legal Resources evaluation form by clicking [here](#) or scanning the QR code below:

