



Protecting koalas in the Sydney Basin bioregion

Strengthening NSW laws to protect the trees that
koalas call home

February 2023



Environmental
Defenders Office

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EXECUTIVE SUMMARY

NSW has many laws and policies that aim to protect koalas and their habitat — e.g. koala state environmental planning policies, forestry rules, and the *NSW Koala Strategy*. But on close examination, it is clear these instruments are not up to the job — they will not, for various reasons, halt the decline of koalas across NSW.

The biggest threats to the species are well known: habitat loss, modification and fragmentation, vehicle strike, dog attack, and stress-induced disease. Yet despite efforts to improve koala conservation (for example, through actions identified in the *NSW Koala Strategy* and Save our Species (SoS) program), planning, environment and natural resource laws continue to allow koala habitat to be destroyed or degraded and the species remains at risk.

For example:

- The *NSW Koala Strategy* is not legally enforceable and fails to effectively address the major threat of habitat loss, fragmentation, and modification.
- The failure to comprehensively map core koala habitat through Koala Plans of Management (KPoMs) across all relevant local government areas means that associated legal safeguards have limited application.
- Significant amounts of clearing and development can occur with very little oversight through exemptions, clearing codes or complying development codes. Safeguards in codes and exemptions have limited application (including due to the failure to implement comprehensive mapping of core koala habitat).
- Other safeguards intended to protect threatened species, including koalas, are often discretionary, meaning that environmental interests are often trumped, especially in the case of major projects.
- Ongoing issues with the implementation of the state environmental planning policy for koala habitat (Koala SEPP) remain unresolved - two different Koala SEPPs remain temporarily in place, guidelines have not been finalised, and the vast majority of councils still don't have KPoMs in place.
- The NSW Biodiversity Offset Scheme does not align with best practice, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions, including with respect to koalas.
- Important conservation initiatives, such as the Save our Species program and investment in protected areas, are often undermined by inadequate regulatory frameworks that continue to allow activities that greatly impact on threatened species and their habitat.
- Other conservation tools (such as Areas of Outstanding Biodiversity Values) are underutilised.
- Changes to the rules for private native forestry means that any newly mapped core koala habitat will not be off limits to logging.



- Koala protections for logging on public land are poorly implemented in practice, and have not been revised to take into account the significant impacts that the 2019-2020 bushfires have had on areas of state forest and koala populations.
- The 10-year review of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) found that national environmental laws are failing to protect and conserve Australia's biodiversity.

In 2022 the conservation status of koalas was upgraded from vulnerable to endangered under NSW and Commonwealth laws. Without urgent reform and improved implementation of law and policies, koalas in NSW will continue on the sharp decline to extinction. We must strengthen koala laws and policies and give government agencies and private landholders the resources to identify koala habitat, assess threats, and properly implement the rules.

EDO has identified the following key areas for reform:

- A. Ensure legal protections apply to *all* koala habitat by implementing consistent, comprehensive mapping across NSW as a matter of urgency**
- B. Maximise protection of koala habitat by mandating appropriate and consistent levels of oversight**
- C. Bolster safeguards in assessment and determination processes**
- D. Prohibit logging in koala habitat**
- E. Improve accountability and enforcement of laws**
- F. Optimise the use of conservation and strategic planning tools**
- G. Overhaul national environmental laws**

Our detailed Key Recommendations are outlined below.

KEY RECOMMENDATIONS

A. Ensure legal protections apply to *all* koala habitat by adopting consistent, comprehensive mapping across NSW as a matter of urgency

- **Recommendation 1: Apply a scientifically robust, and clearly defined, definition of koala habitat to be used consistently across various legal frameworks.**
- **Recommendation 2: Map all koala habitat in approved maps as a matter of urgency.** This could be achieved by either:
 - the NSW Government funding relevant local councils to develop maps as part of koala plans of management (KPoMs) under the Koala SEPPs, and legislating a timeframe for the finalisation of plans; or
 - the NSW Government leading the development of a single, state-wide map of koala habitat to be adopted in law.
- **Recommendation 3: Update all relevant laws to align legal definitions of and protections for koala habitat with approved maps.**



B. Maximise protection of koala habitat by mandating appropriate and consistent levels of oversight

- **Recommendation 4: Direct all proposals likely to have an impact on koala habitat into the most robust assessment pathway.** In particular:
 - a) Strictly limit the scope of allowable activities under the *Local Land Services Act 2013* (LLS Act).
 - b) Ensure only genuinely low impact activities are permitted as allowable activities under the Vegetation in non-rural areas SEPP. The Government should abandon plans to expand the scope of allowable activities to include sustainable grazing, removing invasive native species, and native vegetation thinning. These should remain as activities that require a permit or approval.
 - c) End code-based clearing of koala habitat for agricultural and urban development. All such proposals must be subject to full environmental assessment. This can be achieved by:
 - updating the definition of ‘*environmentally sensitive area*’ in cl 1.5 of the Exempt and Complying Development SEPP to explicitly include koala habitat; or
 - ensuring all koala habitat (not just that currently mapped as core koala habitat in approved KPoMs) is categorised as category 2 sensitive land.
- **Recommendation 5: Abandon plans to ‘decouple’ koala protections from rural land.** There must be consistent, robust mapping and protections for koalas across all land tenures.

C. Bolster safeguards in assessment and determination processes

- **Recommendation 6: Reform biodiversity laws to strengthen protections for koala populations and habitat,** including by:
 - a) Re-introducing provisions to list specific koala populations as a separate listing, irrespective of whether a species is already listed;
 - b) Giving stronger legislative effect to the Save our Species (SoS) program;
 - c) Impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
 - d) Require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider.
- **Recommendation 7: Overhaul the NSW Biodiversity Offsets Scheme in line with best practice.** In particular:
 - a) Offsets must be designed to improve biodiversity outcomes.
 - b) Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts.
 - c) Legislation and policy must set clear limits on the use of offsets.



- d) Offsets must not be available for development or activities that will clear or impact on areas of high environmental values, including important threatened species habitat.
 - e) Offsets must be based on genuine ‘like for like’ principles.
 - f) Time lags in securing offsets and gains should be minimised.
 - g) Indirect offsets must be strictly limited.
 - h) Discounting and exemptions should not be permitted.
 - i) Offsetting must achieve benefits in perpetuity.
 - j) Offsets must be additional.
 - k) Offset arrangements must be transparent and legally enforceable.
 - l) Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered.
 - m) Offset frameworks should build in mechanisms to respond to climate change and stochastic events.
- **Recommendation 8: Strengthen the ‘serious and irreversible impacts’ mechanism to more accurately reflect the principles of ecologically sustainable development.** Specifically:
 - a) Reframe the standard as serious ‘or’ irreversible impacts.
 - b) Require the test to be applied objectively, not subjectively (i.e. – not in the opinion of the decision maker).
 - c) References to extinction risk should be clarified to refer to an appropriate scale and scope (see Principles applicable to determination of “serious and irreversible impacts on biodiversity values”).
 - d) Consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species.
 - e) Provide specific guidance on the application of serious and irreversible impacts (SII) to koalas and koala habitat.
 - f) The mandatory requirement to refuse development proposals that will have serious and irreversible impacts on biodiversity should be applied to both state significant developments and state significant infrastructure (replacing the current discretionary application of the mechanism).
 - **Recommendation 9: Address ongoing concerns with the operation and implementation of the Koala SEPP.** Specifically:
 - a) Adopt a single Koala SEPP for use across all relevant local government areas (LGAs).
 - b) Update the list of LGAs to which the Koala SEPP applies to ensure it encompasses all relevant LGAs.
 - c) Finalise Guidelines as a matter of urgency.
 - d) Clarify the application of the Koala SEPP to regionally significant development and state significant development.
 - e) Ensure all koala habitat is mapped (see Recommendations 1 - 3).
 - f) Remove the arbitrary 1 ha threshold from the Koala SEPP.



D. Prohibit logging in core koala habitat

- **Recommendation 10: Reinstate a comprehensive exclusion of private native forestry (PNF) in all koala habitat.** Specifically, PNF should be excluded in all koala habitat, and this should be properly implemented by completing comprehensive koala habitat mapping in all relevant LGAs per Recommendations 1 - 3.
- **Recommendation 11: Prohibit public land native forest logging in koala habitat.** This can be implemented by finalising comprehensive mapping of koala habitat and introducing exclusions for forestry operations in these areas.

E. Improve accountability and enforcement of laws

- **Recommendation 12: Improve transparency by ensuring public registers are in place and information available on public registers is comprehensive and readily accessible.** This includes registers of approvals for development, clearing and forestry, offset agreements, biodiversity certificates etc.
- **Recommendation 13: Improve reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved.** This can include, for example, monitoring and reporting on set aside obligations under clearing laws, biodiversity offsets obligations under development approvals and clearing approvals, and mitigation measures under biodiversity certificates.
- **Recommendation 14: To improve accountability, ensure that third party appeal rights are available,** including third party merit appeal rights for major projects under the EP&A Act and open standing to enforce breaches of the Forestry Act.
- **Recommendation 15:** Compliance and enforcement policies should identify and promote opportunities to **seek remedies for unlawful activities that include the restoration and enhancement of koala habitat.**

F. Optimise the use of conservation and strategic planning tools

- **Recommendation 16: Make better use of the area of outstanding biodiversity value (AOBV) mechanism to protect koala habitat,** including by:
 - a) Declaring SoS sites (outside national parks and reserves) AOBVs; and funding these AOBVs for protection and making them off-limits from harm – including by mining interests (which otherwise continue to override biodiversity protection);
 - b) Removing the requirement for third parties to obtain landholder support prior to nominating an area as an AOBV.



- **Recommendation 17: Continue and enhance funding to protected areas including national parks and conservation agreements on private land.** This should include continued targeted funding for the NSW Biodiversity Conservation Trust to drive an uptake in private land conservation in priority koala habitat areas.

G. Overhaul national environmental laws

- **Recommendation 18: Overhaul national environmental laws to effectively protect koalas and koala habitat.** Specifically:
 - a) Prioritise the implementation of the proposed new National Environmental Standard for Regional Planning and regional plans to ensure timely protection for koalas (this should not be delayed until 2028).
 - b) Identify koala habitat in proposed new regional plans to ensure these areas are priority areas for action.
 - c) Ensure that any koala habitat that is critical to the survival of koalas is declared as ‘critical habitat’ and designated ‘red’ – high environmental values.
 - d) Develop a National Environmental Standard for koalas setting out specific requirements for activities that will have a significant impact on koalas, including restrictions on clearing koala habitat.
 - e) Ensure all proposed National Environmental Standards are outcomes-focused and legally binding on all decisions and functions under the EPBC Act.
 - f) More broadly, strengthen threatened species safeguards in both threat abatement and recovery planning, and assessment and determination processes



Glossary

AOBV	Area of Outstanding Biodiversity Value
ARKS	Areas of Regional Koala Significance
BC Act	<i>Biodiversity Conservation Act 2016</i> (NSW)
BCT	Biodiversity Conservation Trust
BDAR	Biodiversity Development Assessment Report
BOS	Biodiversity Offsets Scheme
CAM	Common Assessment Method
CSSI	Critical State Significant Infrastructure
DPE	NSW Department of Planning and Environment
Environment Minister	NSW Minister for Environment and Heritage
EPA	NSW Environment Protection Authority
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i> (NSW)
EPI	Environmental Planning Instrument
Exempt and Complying Development SEPP	<i>State Environmental Planning Policy (Exempt and Complying Development Codes) 2008</i>
Forestry Act	<i>Forestry Act 2012</i> (NSW)
IFOA	Integrated Forestry Operations Approval
IPC	NSW Independent Planning Commission
KPoM	Koala Plan of Management
Koala SEPP 2019	<i>State Environmental Planning Policy (Koala Habitat Protection) 2019</i>
Koala SEPP 2020	<i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i> , Chapter 3 – Koala habitat protection 2020
Koala SEPP 2021	<i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i> , Chapter 4 – Koala habitat protection 2021
LEP	Local Environment Plan
LGA	Local Government Area
LLS	Local Land Services
LLS Act	<i>Local Land Services Act 2013</i> (NSW)
LSPS	Local strategic planning statement
NRC	NSW Natural Resources Commission
Planning Minister	NSW Minister for Planning
PNF	Private Native Forestry
PNF Codes	Private Native Forestry Codes of Practice. There are currently four PNF Codes that apply to different regions: Northern NSW, Southern NSW, River red gum forests, and Cypress and western hardwood forests.
REF	Review of environmental factors
RFA	Regional Forest Agreement
SBB	Sydney Basin Bioregion
SEPP	State Environmental Planning Policy
SEPP 44	<i>State Environmental Planning Policy No 44—Koala Habitat Protection</i>
SIA Map	Site Investigation Area for Koala Plans of Management Map (under Koala SEPP 2021)
SII	Serious and Irreversible Impacts
SIS	Species Impact Statement
SSD	State Significant Development
SSI	State Significant Infrastructure
Transport and Infrastructure SEPP	<i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i>
TSSC	NSW Threatened Species Scientific Committee
Vegetation in non-rural areas SEPP	<i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i> , Chapter 2 – Vegetation in non-rural areas



1. INTRODUCTION

1.1 Koalas in the Sydney Basin Bioregion

The Sydney Basin Bioregion (**SBB**) covers a large area from just north of Bateman’s Bay on the South Coast, up to Nelson Bay on the North Coast, and almost as far west as Mudgee - see **Figure 1 – Sydney Basin Bioregion**.¹ As of 2012, it was estimated that the SBB contains 10.44% of the NSW Koala population, with a mean estimate of 5,667 koalas.² These figures were estimated before the 2019-20 bushfire season, which had a significant impact on koalas and koala habitat across the state.³



Figure 1 – Sydney Basin Bioregion (Source: NSW Government, Office of Environment & Heritage⁴)

Koalas in the SBB are represented by various populations spread throughout the Bioregion. For example:

- The *NSW Koala Strategy* identifies various koala populations, including those prioritised for investment and filling key knowledge gaps. In the SBB this includes populations in the Blue

¹ https://www.sydneybasinkoalanetwork.org.au/sydney_basin_bioregion

² Lane, A., Wallis, K., and Phillips, S. 2020. *A review of the conservation status of New South Wales populations of the Koala (Phascolarctos cinereus) leading up to and including part of the 2019/20 fire event*. Report to International Fund for Animal Welfare (IFAW). Biolink Ecological Consultants, Uki NSW p 8. < <https://www.ifaw.org/au/resources/koala-conservation-status-new-south-wales>>

³ See for example the findings of the NSW Parliamentary Inquiry in koalas and koala habitat, which found that “there has been a substantial loss of both suitable koala habitat and koalas across New South Wales as a result of the 2019-2020 bushfires. An estimated 24 per cent of koala habitat on public land has been severely impacted across the State, but in some parts there has been a devastating loss of up to 81 per cent”. NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020, pp78-80, <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>>

⁴ <https://www.environment.nsw.gov.au/threatenedspeciesapp/AreaHabitatSearch.aspx?cmaname=Sydney+Basin>



Mountains, South-West Sydney, Southern Highlands, and Port Stephens as well as Lower Hunter, Brisbane Water and Wollemi.⁵

- According to scientific studies, there are about 300 koalas in the Macarthur bushland in South-West Sydney, which is the largest known koala population in the Sydney Basin. Importantly, this population is chlamydia-free, but is at risk from ongoing urban expansion in the area.⁶
- Koalas have also been identified around the Heathcote and Sutherland region,⁷ with a population of 80 recently recorded in Sutherland.⁸

Recent polling commissioned by the Sydney Basin Koala Network indicates that there is low awareness amongst NSW residents that koalas are living in areas near their towns and cities.⁹ The polling found:

- *Whilst most (81%) NSW citizens aged 18+ say that koalas live in bushland, less than one in three (31%) are aware that koalas reside at the edge of their cities or towns. City dwellers are less aware of koalas living in neighbouring urban environments than those in regional areas (27% vs 40%).*
- *Lowest levels of awareness were with younger residents; just 16% of those aged 18-24 were aware of the close proximity of koalas to the city than older residents 50+ (36%).*
- *Respondents residing in the Sydney Basin area are less likely to say that koalas live on the edge of their cities and towns (27%), compared to those residing in other parts of NSW (40%).*

Given the close proximity of koala populations to human populations and activity, koalas are heavily impacted by urban expansion, land clearing, and industry (e.g. forestry and mining) and related impacts including vehicle strikes, dog attacks and stress-induced disease. These activities cause the loss, modification, and fragmentation of koala habitat. Climate change is also severely impacting koalas, by compounding the intensity and frequency of impacts from fire, drought, and heatwaves, and affecting the quality of koala food sources and habitat.¹⁰

These impacts are contributing to an ongoing decline in koala numbers across NSW. Koala numbers across the state are difficult to estimate. Research undertaken in 2012 estimated there were approximately 36,000 koalas in NSW.¹¹ This figure was adopted by the NSW Chief Scientist and

⁵ Department of Planning and Environment, *NSW Koala Strategy*, 2022, pp 13-17 < <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-2022-220075.pdf>>

⁶ See, for example, ABC News, *Last healthy koala colony in Sydney under threat from development, potential chlamydia infection*, 21 August 2017 < <https://www.abc.net.au/news/2017-08-21/last-healthy-koala-colony-in-sydney-under-threat/8819786>>, see also Sydney Morning Herald, *Sydney region's last healthy koala population threatened by development*, 19 April 2022 < <https://www.smh.com.au/environment/conservation/sydney-region-s-last-healthy-koala-population-threatened-by-development-20220413-p5ad4w.html>>

⁷ See <https://www.ssec.org.au/our-campaigns/koalas-and-resilient-habitat-in-the-sutherland-shire/>

⁸ 9News, *NSW citizen scientists discover koala populations in Sutherland Shire*, 3 May 2022 < <https://www.9news.com.au/national/koalas-nsw-habitats-citizen-scientists-discover-koalas-in-sydney-sutherland-shire/8f3de71e-f6f0-4177-92cd-03e237fc5b8c>>

⁹ See https://www.sydneybasinkoalanetwork.org.au/mr_new_voice_to_fight_for_koala_protection

¹⁰ NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020, Chapter 2 and Chapter 4. <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>>

¹¹ Adams-Hosking, C, McBride, M.F, Baxter, G, Burgman, M, de Villiers, D, Kavanagh, R, Lawler, I, Lunney, D, Melzer, A, Menkhorst, P, Molsher, R, et al., *Use of expert knowledge to elicit population trends for the koala (Phascolarctos cinereus)*, 2016 *Diversity and Distributions*, 22(3), 249-262, <https://onlinelibrary.wiley.com/doi/full/10.1111/ddi.12400>



Engineer in 2016. The NSW Chief Scientist also estimated a 26 per cent decline in numbers over the past three koala generations (15-21 years) and potentially over the next three generations.¹²

The 2020 report of the NSW Parliamentary Inquiry into koala populations and habitat in New South Wales found that (emphasis added):

- following the 2019-2020 bushfires and the general trend of population decline, the current estimated number of 36,000 koalas in New South Wales is outdated and unreliable. (Finding 1)
- given the scale of loss to koala populations across New South Wales as a result of the 2019-2020 bushfires and **without urgent government intervention to protect habitat and address all other threats, the koala will become extinct in New South Wales before 2050** (Finding 2).

In May 2022, the NSW Threatened Species Scientific Committee confirmed that koala populations in NSW were one step closer to extinction. It upgraded the koala's threatened species status from vulnerable to endangered under the NSW *Biodiversity Conservation Act 2016 (BC Act)*.¹³ This followed the decision to upgrade the koala's threatened species status from vulnerable to endangered under the Commonwealth EPBC Act.

1.2 Habitat loss – the biggest threat to koalas

It is well known that habitat loss, modification and fragmentation is one of the biggest threats to koalas in NSW. Our failure to curb habitat loss is driving this iconic species to extinction.

In addition to the findings above the NSW parliamentary inquiry into koala populations and habitat in NSW also found that (emphasis added):

- the **fragmentation and loss of habitat poses the most serious threat to koala populations** in New South Wales (Finding 4); and
- the **future of koalas** in the wild in New South Wales **cannot be guaranteed unless the NSW Government takes stronger action to prevent further loss of koala habitat** (Finding 5).¹⁴

In deciding to upgrade the koala's conservation status from vulnerable to endangered, the NSW Threatened Species Scientific Committee found that (emphasis added):

- **Vegetation clearance from activities including urbanisation, grazing, agriculture, and mining have significantly reduced the distribution of koalas** (McAlpine et al. 2015). Climate

¹² NSW Chief Scientist & Engineer, *Report of the Independent Review into the Decline of Koala Populations in Key Areas of NSW*, December 2016 <https://www.chiefscientist.nsw.gov.au/data/assets/pdf_file/0010/94519/161202-NSWCSE-koala-report.pdf>

¹³ NSW Threatened Species Scientific Committee, *Notice and reasons for the Final Determination*, 20 May 2022 <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Scientific-Committee/Determinations/final-determination-phascolarctos-cinereus-endangered-species.pdf?la=en&hash=005D26A4C7215AF7CF913ADE39FCC02F0E211089>>

¹⁴ NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020, <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>>



change drivers (e.g. drought and rising temperatures) have also resulted in a reduction of climatically suitable habitat (Adams-Hosking et al. 2011).

- Human activities including **deforestation and land clearance for grazing, agriculture, urbanisation, timber harvesting, mining and other activities have resulted in loss, fragmentation, and degradation of koala habitats.**
- **Land clearing continues to impact habitat across the koala's range** (DES 2018).
- **Modelled climatic suitability from 2010 to 2030 indicates a 38-52% reduction in available habitat for the koala, and a 62% reduction in koala habitat by 2070** has been forecast (Adams-Hosking et al. 2011).
- **Vehicle related mortality occurs regularly on roads close to occupied koala habitat** (Gonzalez-Astudillo 2018; Queensland-Government 2021). **Dog attacks are a significant cause of death and injury especially in areas within and adjacent to peri-urban and residential areas** (DPIE 2020). Koalas are unable to adapt to these threats and **as human activities continue to expand into koala habitat, trauma from these threats will increase.**
- Wild populations of koalas carry disease pathogens including koala retrovirus (KoRV) and Chlamydia (*Chlamydia percorum*). **The prevalence of disease (chlamydiosis) has been found to increase following** extreme stress from hot weather, drought, **habitat loss and fragmentation** (Lunney et al. 2012; Davies et al. 2013).

We know what is driving koalas to extinction – ongoing habitat fragmentation, modification and loss from human activities, and the related impacts including vehicle strikes, dog attacks and stress-induced disease.

1.3 The need for comprehensive law reform to stop the fragmentation, modification and loss of koala habitat

This report focuses on the critical law reform and improved implementation of current laws needed to stop the ongoing fragmentation, modification, and loss of koala habitat from activities such as development, infrastructure, land clearing, and mining. It is not an exhaustive analysis of NSW planning, environment, and natural resource law. It does not examine each individual legal provision or make an exhaustive list of recommendations for reform; a lot of that analysis has already been done.¹⁵ Rather, it focuses on key changes that are needed to ensure relevant laws are operating

¹⁵ See, for example:

- Paull, D., Pugh, D., Sweeney, O., Taylor, M., Woosnam, O. and Hawes, W. *Koala habitat conservation plan - Koala habitat necessary to protect and enhance koala habitat and populations in New South Wales and Queensland*, 2019, Report prepared for WWF-Australia and partner conservation organisations. Published by WWF-Australia, Sydney <https://www.wwf.org.au/ArticleDocuments/353/WWF-Koala%20Habitat%20Conservation%20Plan-Abridged.pdf.aspx?OverrideExpiry=Y>
- Audit Office of New South Wales, *Managing native vegetation*, June 2019 <<https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>>



effectively to manage the impacts of activities on koalas, and limit the fragmentation, modification, and loss of koala habitat.

It also considers the role of conservation and strategic planning tools available under the legal frameworks examined, such as land use zones and areas of outstanding biodiversity value (**AOBVs**). Other conservation tools such as national park reserves and conservation agreements on private land are mentioned briefly. While these tools are important, the legal mechanisms needed to implement them are already available and are not a priority for law reform. For example, the *NSW Koala Strategy* identifies opportunities to use conservation tools to increase koala populations, and the NSW Government has committed funding to implement the Strategy.¹⁶

The rules intended to protect koalas and their habitat are wholly inadequate (see Case Studies below). Instead of protecting koala habitat, NSW's planning, environment, and natural resource laws facilitate the loss, fragmentation, and modification of koala habitat.

There is a need for comprehensive law reform. Clearing of forests and woodlands for grazing, agriculture, urbanisation, timber harvesting, mining and other industries continue at an increased rate.¹⁷ New commitments to add areas to the National Park Estate or restore degraded landscapes provide limited refuge for koalas, in circumstances where contradictory policy settings continue to allow land to be cleared elsewhere.

In NSW, there are multiple legal pathways regulating the clearing of koala habitat, including in relation to development, infrastructure, land clearing and forestry - see **Table 1 – Legal pathways for regulating the clearing of koala habitat in NSW**. The rules that apply will depend on the type of activity being undertaken (e.g. development, logging, clearing), the scale of the activity, and the tenure and classification of land (e.g. private land, public land, rural land or non-rural land). This report examines each of these legal pathways, identifies inadequacies, and highlights key issues for koalas.

Additionally, the BC Act provides legal mechanisms aimed at protecting native animals and conserving biodiversity, with many of those mechanisms applied across the various legal pathways.

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- Environmental Defenders Office, *Submission to the Inquiry into koala populations and habitat in New South Wales*, August 2019 <https://www.edo.org.au/wp-content/uploads/2019/12/190814_NSW_Koala_Inquiry_-_EDO_NSW_Submission_-_Edited.pdf>
 - NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020, <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>>
 - Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, August 2022, <<https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>>
 - New South Wales Parliament, Legislative Council, Portfolio Committee No. 7, *Integrity of the NSW Biodiversity Offsets Scheme*. Report no. 16, November 2022, available at <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2822>>

¹⁶ Department of Planning and Environment, *NSW Koala Strategy*, 2022, <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-2022-220075.pdf>>

¹⁷ The NSW State of the Environment Report 2021 states: “The average rate of permanent clearing over seven years from 2009 to 2015 was 13,028 hectares per year... The rate of permanent clearing increased to 26,200 hectares per year in 2016, the year before the new regulatory framework (Biodiversity Conservation Act 2016) came into effect in August 2017. The subsequent rate of clearing from 2017 to 2019 was 34,933 hectares per year on average. Some of this included agricultural clearing approved under the previous native vegetation framework. <<https://www.soe.epa.nsw.gov.au/all-themes/land/native-vegetation#clearing-rate>>



While this report is focused on koalas in the SBB, the legal frameworks that apply in the SBB also apply in other areas of the State where koalas are found. Therefore, the analysis and recommendations are likely to have broader application beyond the SBB.

The report examines the following key legal and policy frameworks:

- *NSW Koala Strategy* (Part 2)
- *Biodiversity Conservation Act 2016* (Part 3)
- Part 4 Development (Part 4)
- Part 5 Infrastructure (Part 5)
- Clearing of vegetation on rural land (Part 6)
- Clearing of vegetation in non-rural areas (Part 7)
- Forestry - private land (Part 8)
- Forestry - public land (Part 9)
- Bushfire hazard and disaster management legislation (Part 10)
- Protected areas (Part 11)
- Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) (Part 12)



Table 1 – Legal pathways for regulating the clearing of koala habitat in NSW

Activity type	Assessment and approval pathway	Relevant legal framework
Development and infrastructure	‘Low impact’ – exempt and complying development	<i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i> <i>State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Exempt and Complying Development SEPP)</i>
	Part 4 development (Local development and regional development)	Part 4, <i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i> And in specified local government areas (LGAs): <ul style="list-style-type: none"> • Rural land: <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i>, Chapter 3 – Koala habitat protection 2020 (Koala SEPP 2020) • Non-rural land: <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i>, Chapter 4 – Koala habitat protection 2021 (Koala SEPP 2021)
	State significant development (SSD)	Part 4, <i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i>
	Part 5 activity	Part 5, <i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i>
	State Significant Infrastructure (SII) and Critical State significant infrastructure (CSII)	Part 5, <i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i> <i>State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP)</i> .
Clearing only – rural land	‘Low impact’ - Allowable activities	Part 5A, <i>Local Land Services Act 2013 (NSW) (LLS Act)</i> Schedule 5A
	Code-based clearing	Part 5A, <i>Local Land Services Act 2013 (NSW) (LLS Act)</i> <i>Land Management (Native Vegetation) Code 2018</i>
	High-impact clearing – approval	Part 5A, <i>Local Land Services Act 2013 (NSW) (LLS Act)</i>



Clearing only – non-rural land	Allowable activities	Chapter 2 – Vegetation in non-rural areas, <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i>
	Council permit– general clearing	Chapter 2 – Vegetation in non-rural areas, <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i>
	NV Panel approval – high impact clearing	Chapter 2 – Vegetation in non-rural areas, <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i>
Forestry – Private land	Single pathway – see specific triggers for assessment requirements	Part 5B, <i>Local Land Services Act 2013</i> (NSW) (LLS Act)
Forestry – public land	Single pathway – see specific triggers for assessment requirements	<i>Forestry Act 2012</i> (NSW) (Forestry Act) Integrated Forestry Operations Approvals (IFOAs)
Commonwealth- EPBC Act	Single pathway - for activities that have a significant impact on matters of national environmental significance	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) (EPBC Act)



2. NSW Koala Strategy

2.1 Overview

In April 2022 the NSW Government released a new *NSW Koala Strategy*.¹⁸ The Strategy follows on from the previous *NSW Koala Strategy 2018–21*; and is the first Strategy aimed at achieving the Government’s commitment to double koala numbers by 2050. The Government has allocated more than \$190 million to 2026 to deliver the targeted conservation actions that the strategy sets out.

The NSW Government has mapped Areas of Regional Koala Significance (**ARKS**) across NSW identifying areas where koalas are known to occur in moderate to high densities.¹⁹ ARKS have been developed to guide the government in prioritising areas to invest in for habitat conservation and restoration, including through the NSW Government’s Save our Species program²⁰ and *NSW Koala Strategy*.²¹ ARKS have no legal status. They do not trigger any additional legal requirements or protections. The statewide Koala Habitat Information Base has also been developed as part of the *NSW Koala Strategy*. It is not a regulatory tool – that is, it does not identify and categorise land for the purpose of triggering and implementing laws. Rather, it simply aims to collate various layers of existing spatial information in one location,²² in order to provide the best available scientific information to support decision makers, rehabilitators, land managers, and community members involved in koala conservation.²³

2.2 Key issues for koalas

From a legal perspective, the *NSW Koala Strategy* has no legal weight. It is not required to be prepared by legislation and it is not legally enforceable. While it sets out the current government’s

¹⁸ Department of Planning and Environment, *NSW Koala Strategy*, 2022, < <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-2022-220075.pdf>

¹⁹ NSW Department of Planning, Industry and Environment, *Framework for the spatial prioritisation of koala conservation actions in NSW*, 2020, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/framework-spatial-prioritisation-koala-conservation-190045.pdf>

²⁰ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/saving-our-species-program#:~:text=Saving%20our%20Species%20%28SoS%29%20is%20one%20of%20the,the%20future%20of%20Australia%E2%80%99s%20unique%20plants%20and%20animals.>

²¹ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/nsw-koala-strategy#:~:text=NSW%20Koala%20Strategy%201%20Towards%20doubling%20koalas%20by,...%203%20Delivering%20targeted%20action%20and%20investment%20>

²² The Koala Habitat Information Base comprises several layers of existing spatial information, including:

- Koala Habitat Suitability Model (KHSM) – the probability of finding koala habitat at any location
- Koala Tree Suitability Index (KTSI) – the probability of finding a tree species that koalas are known to use for food or shelter
- Koala Likelihood Map (KLM) including a confidence layer – predicts the likelihood of finding a koala at a location
- Areas of Regional Koala Significance (ARKS) – identifies key koala populations and management areas with potential for long-term viability as well as priority threats to key koala populations.
- Native vegetation of NSW – this is a high-resolution model of native tree cover and water bodies
- All koala sightings recorded in NSW Bionet

²³ See <https://datasets.seed.nsw.gov.au/dataset/koala-habitat-information-base>



initial 5-year strategy for doubling koala numbers by 2050, funding has only been committed for five years, and the Strategy can be overridden by successive governments.

Pillar 1 of the Strategy is aimed at koala habitat conservation. It makes some important commitments to purchase high-quality koala habitat on private land to add to the national park estate, to permanently protect koala habitat on private land through in-perpetuity conservation agreements, and to deliver restoration projects across the state. These are important undertakings that utilise existing legal mechanisms to manage koala habitat through protected area frameworks.

However, one of the biggest flaws of the Strategy is its failure to effectively address the major threat of habitat fragmentation, modification, and loss. While the Strategy aims to secure, restore or create an additional 100,000 ha of habitat by 2050, it does not estimate how much existing koala habitat is at risk of being lost over that same period due to clearing for development, infrastructure, agriculture or forestry, or suggest options for slowing rates of habitat loss. There are no commitments to reform land clearing laws to reverse skyrocketing clearing rates, overhaul the problematic biodiversity offsets scheme, or address ongoing concerns about the impacts of forestry operations on koalas and koala habitats.

Additionally, the Strategy does not propose a method for monitoring and reporting on koala habitat loss through to 2050 so that gains made through the Strategy can be understood in the context of other changes in the landscape over that time.

3. Biodiversity Conservation Act 2016

3.1 Introduction

The *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) is the primary piece of legislation aimed at protecting native animals in NSW, including koalas.²⁴ The BC Act:

- sets out protections for native plants and animals and contains criminal offences, including for harming threatened species;
- establishes the process for listing threatened species (including the lists themselves);
- allows for licensing of certain activities;
- requires a Biodiversity Conservation Program to be established;
- implements a safeguard for serious and irreversible impacts on threatened species;
- sets up a framework for the Minister and Biodiversity Conservation Trust (**BCT**) to enter into agreements with landholders to manage biodiversity on their land; and
- provides for the Biodiversity Offsets Scheme (**BOS**) to apply to certain developments.

The koala is currently listed as an endangered threatened species under the BC Act.

²⁴ The BC Act repealed and replaced the *Threatened Species Conservation Act 1995*.



While the BC Act establishes offences for harming protected animals and threatened species,²⁵ it is a defence under the BC Act if the act is authorised by an approval or other legislation (e.g. development consent, land clearing codes, etc.).²⁶ The BC Act interacts with environment and planning laws in other ways too. For example, the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**) contains various requirements for assessing the impacts of development and infrastructure on threatened species, and implementing biodiversity offsets requirements determined under the BOS through conditions of consent.

The following key elements of the BC Act are discussed in more detail below:

- Biodiversity Offsets Scheme (BOS) (3.2)
- Serious and Irreversible Impacts safeguard (SII) (3.3)
- Threatened species listing processes (3.4)
- Areas of Outstanding Biodiversity Value (AOBVs) (3.5)
- Biodiversity Conservation Program (3.6)

3.2 Biodiversity offsets Scheme (BOS)

3.2.1 Overview

The Biodiversity Offsets Scheme (**BOS**) aims to provide a framework for offsetting unavoidable impacts on biodiversity. It does this by requiring impacts from development to be ‘offset’ with biodiversity gains, usually generated by protecting and managing land for biodiversity outcomes, via landholder stewardship agreements.

Whether or not the BOS must be applied to certain development (or clearing), depends on the assessment and determination pathway, the scale of impact and whether a biodiversity development assessment report (**BDAR**) is required.

For example:

- **For Part 4 development:** If the proposed development is *likely to significantly affect threatened species*, the application for development consent is to be accompanied by a BDAR and the BOS applies. Development is likely to significantly affect threatened species if:
 - it is likely to significantly affect threatened species or ecological communities, or their habitats, according to the ‘5-part test’ in section 7.3 of the BC Act; or
 - the development exceeds the BOS threshold;²⁷ or
 - it is carried out in a declared AOBV.
- **For SSD or SSI:** Any application for state significant development (**SSD**) or state significant infrastructure (**SSI**) must be accompanied by a BDAR unless the Planning Agency Head and

²⁵ BC Act, Part 2, Division 1

²⁶ BC Act, Part 2, Division 2

²⁷ BC Act, s 7.4, BC Regulation, cl 7.1 – 7.3.



the Environment Agency Head determine that the proposed development is not likely to have any significant impact on biodiversity values.²⁸

- **For Part 5 activities (other than SSI):** The proponent may elect to prepare either a Species Impacts Statement (**SIS**) or a BDAR. If a BDAR is elected, then the BOS applies. The BOS threshold does not apply to development that is an activity subject to environmental impact assessment under Part 5.²⁹
- **For vegetation clearing that requires approval by the Native Vegetation Panel** (under either Part 5A of the LLS Act or Vegetation in non-rural areas SEPP): a BDAR is required and the BOS applies.³⁰

The BOS has no application for forestry operations carried out under Part 5B of the LLS Act or the *Forestry Act 2012* (NSW) and Integrated Forestry Operations Approvals (**IFOAs**).

3.2.2 Key issues for koalas

EDO has written extensively regarding our concerns with the NSW BOS.³¹ In summary, the BOS does not align with best practice, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions, including with respect to koalas. We are particularly concerned that:

- The BOS does not impose a clear and objective ‘*no net loss or better*’ environmental standard;³²
- There are no safeguards to ensure the *genuine* application of the avoid, minimise, offset hierarchy impacts on threatened species.³³ Offsets should be a measure of last resort and there must be clear guidance provided as to what steps must be taken and evidenced before offsets can be used. Projects that do not demonstrably attempt to avoid or minimise environmental impacts should be rejected.
- The current offset rules for a threatened species provide a significant degree of flexibility.³⁴ The variation rules and ability to pay money to the BCT in lieu of actual like for like offsets undermines the integrity of the BOS. Under the variation rules, proponents clearing koala habitat can discharge obligations by offsetting koala populations with another animal.³⁵ And even where koalas are being offset with koalas,

²⁸ BC Act, s 7.9.

²⁹ BC Act, s 7.2(2).

³⁰ See LLS Act, s60ZG and Vegetation in non-rural areas SEPP, cl 2.15.

³¹ See, for example:

- EDO, Submission to the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme, 14 September 2021 <<https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>>
- EDO, EDO, *Defending the Unburnt: Offsetting our way to extinction*, November 2022 <<https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>>

³² The current test is subjective and discretionary: when the Minister establishes the BAM, the Minister is to adopt a standard that, in the opinion of the Minister, will result in no net loss of biodiversity in New South Wales. (BC Act s 6.7(3)(b).

³³ *Biodiversity Conservation Regulation 2017*, cl 6.2(1).

³⁴ *Biodiversity Conservation Regulation 2017*, cl 6.2(1).

³⁵ See BC Regulation cl 6.4(1)(c)(ii)



there are no location requirements for offsetting ‘species credit’ species. This means that, for example, a local koala population and habitat in one part of the SBB could be offset with a different koala population elsewhere in the SBB which may be hundreds of kilometres away.

- The system does not recognise that if like for like offsets are not available,³⁶ this is a strong indication that the proposal’s impact is significant (and potentially serious or irreversible). That is, there are no effective red lights, and everything is amenable to offsetting despite ecological evidence to the contrary.
- Decision makers may be able to reduce or increase the number of biodiversity credits required to be met (i.e., retired) by a proponent, for non-ecological reasons (having regards to social and economic impacts of the proposed development); and in some cases may not be required to give reasons for a decision.³⁷

3.3 Serious and Irreversible Impacts safeguard

3.3.1 Overview

The concept of ‘serious and irreversible impacts on biodiversity values’ is a mechanism used to assess the severity of impacts on biodiversity that would be caused by a proposed development or clearing activity. Specific provisions create obligations on decision makers once serious and irreversible impacts (**SII**) are identified. For example:

- **Part 4 development:** If proposed Part 4 development will have SII on threatened species, it must be refused.³⁸
- **Vegetation clearing that requires approval by the Native Vegetation Panel:** If vegetation clearing that requires approval by the NVP will have SII on threatened species, it must be refused.³⁹
- **SSD and SII:** If a development proposal for SSD will have SSI on threatened species, the consent authority must take those impacts into consideration, and is required to determine

³⁶ Like for like also meaning within an appropriate geographic distance of the impact.

³⁷ Specifically,

- In the case of Part 4 local development, a consent authority may reduce or increase the number of biodiversity credits that would otherwise be required to be retired if the consent authority determines that *the reduction or increase is justified having regard to the environmental, social and economic impacts of the proposed development*. The consent authority *must give reasons for a decision* to reduce or increase the number of biodiversity credits (BC Act, s 7.13(4)).
- In the case of State Significant Development or State Significant Infrastructure, the Minister *may* require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values. The Minister is not required to justify the decision having regard to the environmental, social and economic impacts of the proposed development, or provide reasons for the decision BC Act, s 7.14(3)).
- In the case of Part 5 activities, the determining *may* require the proponent to retire biodiversity credits to offset the residual impact on biodiversity values. If the number of biodiversity credits required to be retired is less than that specified in the biodiversity development assessment report, the determining authority is to *give reasons for the decision to reduce the number of biodiversity credits* (BC Act, s7.15(4)).

³⁸ BC Act, s 7.16(2).

³⁹ LLS Act, s 60ZF; Vegetation in non-rural areas SEPP, cl 2.14(6).



whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.⁴⁰

The Department of Planning and Environment (**DPE**) has published *Guidance to assist a decision-maker to determine a serious and irreversible impact*.⁴¹ DPE has prepared a list of entities that it has assessed as likely to be at risk of SSI to assist assessors and approval authorities.⁴² The list is not exhaustive and the Guidelines should be applied on a case by case basis. The koala is not currently on that list.

3.3.2 Key issues for koalas

The SII mechanism could be further strengthened to more accurately reflect the principles of ecologically sustainable development. For example:

- the standard should be serious ‘or’ irreversible, not ‘and’;
- the test should be objective, rather than subjective;
- references to extinction risk should be clarified to refer to an appropriate scale and scope;
- consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species; and
- the requirement to refuse proposals that will have SSI on biodiversity (as is the case for most development), must also extend to SSD and SSI, not just to local projects. That is, SSD and SSI with significant impacts on koalas should be subject to this requirement.

3.4 Threatened species listing processes

3.4.1 Overview

Part 4 of the BC Act provides the framework for nominating and declaring species as threatened.

3.4.2 Key issues for koalas

We note the following two issues that may impact on the ability of the framework to effectively protect koalas:

- **Option to list specific populations** - The option to list specific populations under the former *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**) was repealed and not reintroduced under the BC Act. The ability to recognise distinct local populations is essential for conserving and retaining genetic diversity⁴³ - a fundamental component of biological

⁴⁰ BC Act, s 7.16(3) and (4).

⁴¹ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development>

⁴² See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development>

⁴³ The recognition that individual populations may constitute biologically distinct taxa is consistent with the concept of Evolutionary Significant Units (ESUs) under the United States of America Endangered Species Act of 1973. Under the Act a sub-species, race or population may be listed as an endangered ESU even if the species is otherwise secure overall.



diversity. The removal of the option to list local populations is problematic because whilst the overall koala population in NSW is considered to be ‘endangered’, some koala populations are in a significantly worse state in particular bioregions. The ability to list specific koala populations with an appropriate threatened species classification is useful for triggering more rigorous protections for more vulnerable or threatened koala populations.⁴⁴

- **Application of provisional listing provisions** - To the best of our knowledge, the provisional listing provisions in the BC Act have not been used following a major event that has significantly impacted on the conservation status of a species (e.g. bushfire). A nomination was made to list the koala on an emergency basis under the BC Act following the 2019-2020 bushfires. However, the NSW Threatened Species Scientific Committee (**TSSC**), acknowledging that a full assessment was already underway by the Commonwealth, elected to await the Commonwealth assessment and make a full determination in accordance with the Common Assessment Method (**CAM**), rather than to list the koala provisionally. While the koala has subsequently been listed as endangered, it provides a case study of how the provisions failed to provide emergency protection after the bushfires. EDO has made recommendations for strengthening the provisions so that other species may not suffer the same fate following future events.⁴⁵

3.5 Areas of Outstanding Biodiversity Value

3.5.1 Overview

Under the BC Act, the Minister can declare an area as an Area of Outstanding Biodiversity Value (**AOBV**). It is an offence to damage an AOBV without any relevant approval.⁴⁶ Certain assessment and determination pathways cannot be used in an AOBV,⁴⁷ and development proposals within an AOBV is deemed likely to significantly affect threatened species for the purpose of determining whether a BDAR is required.⁴⁸

3.5.2 Key issues for koalas

AOBVs are intended to be a ‘priority for government investment’ but no new AOBVs have been declared since the BC Act came into effect.⁴⁹ One significant barrier to third parties nominating an area for declaration as an AOBV is the requirement to demonstrate landholder support. This is not a legislative requirement, but a procedural step in the nomination process.⁵⁰ Requiring a person

⁴⁴ EDO NSW Submission on the draft Biodiversity Conservation Bill 2016, June 2016, available at https://www.edonsw.org.au/nsw_biodiversity_reform_package_2016, p 19

⁴⁵ EDO, *Defending the Unburnt, Wildlife can’t wait: Ensuring timely protection of our threatened biodiversity*, November 2022, <<https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>>

⁴⁶ BC Act, s 2.3.

⁴⁷ For example, exempt development must not be carried out on land that is a declared AOBV – per State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, cl 1.16(1)(b1).

⁴⁸ BC Act, cl 7.2.

⁴⁹ See EDO NSW *Briefing Note Areas of Outstanding Biodiversity Value under the Biodiversity Conservation Act 2016* (2019), available at www.edonsw.org.au/aobv_briefing_note

⁵⁰ Section 3.3 of the BC Act provides that it is the role of the Environment Agency Head to notify landholders whose land is within the proposed area and give landholders a reasonable opportunity to make submissions. While there is no explicit



nominating an AOBV to provide landholder consent places an undue obligation on nominators, and may create an obstacle for nominations, particularly when nominators may have no existing relationship with landholders or appropriate avenue to commence discussions. Further, the consent and support of the landholder should not be a factor in deciding whether an area should be declared as an AOBV.

Obviously if an AOBV is declared on private land, cooperation of the landholder will be essential for future management and protection. This is recognised in the NSW Government's *Biodiversity Conservation Investment Strategy 2018* which states that "Areas of outstanding biodiversity value are an 'automatic priority' under this strategy. To prioritise conservation of AOBVs, the BC Act requires the Minister for the Environment and Heritage (or delegate) to direct the Biodiversity Conservation Trust to take reasonable steps to enter into a private land conservation agreement with any landholder whose land is within an AOBV".⁵¹

The AOBV mechanism could be used to provide protection for important koala habitat. It is noted that Action 1.10 of the *NSW Koala Strategy* states that the Minister for Environment and Heritage will establish one AOBV for koalas under the BC Act. There is no further information about how this will be achieved, and there is no rationale for this action being limited to just one AOBV. Consideration should be given to expanding this, for example, by declaring all relevant Areas of Regional Koala Significance (ARKS) to be AOBVs.

3.6 Biodiversity Conservation Program

3.6.1 Overview

Part 4, Division 6 of the BC Act requires the Environment Agency Head⁵² to establish a Biodiversity Conservation Program that will:

- maximise the long-term security of threatened species and threatened ecological communities in nature; and
- minimise the impacts of key threatening processes on biodiversity and ecological integrity.

The Biodiversity Conservation Program is currently delivered through the NSW Government's Saving our Species (**SoS**) program - that is, SoS is the Government's Biodiversity Conservation Program, for the purpose of Part 4, Division 6 of the BC Act.⁵³

obligation on the BC Act on a person nominating an AOBV to seek landholder support, the Department's website and nomination form require evidence that the person nominating an area has have spoken to the owner of the land, and that the landowner supports your proposal being made < <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/proposals-for-areas-of-outstanding-biodiversity-value/making-a-proposal/area-of-outstanding-biodiversity-value-proposal-form>>

⁵¹ NSW Government, *Biodiversity Conservation Investment Strategy 2018 - A strategy to guide investment in private land conservation*, February 2018, <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Conservation-management-notes/biodiversity-conservation-investment-strategy-2018-180080.pdf>

⁵² Environment Agency Head refers to the head of the Environment and Heritage division of the NSW Department of Planning and Environment.

⁵³ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/biodiversity-conservation-program>



The SoS program aims to manage and conserve threatened species based on their differing conservation needs, including through on-ground conservation projects working directly with landholders and the community. Koalas are identified as one of eight iconic species in SoS program in NSW.⁵⁴

3.6.2 Key issues for koalas

The SoS program plays an important role in managing impacts on threatened species and conserving and restoring important habitat, however it operates separately to the legal frameworks regulating activities on land. The result is that conservation efforts under the SoS program may be undermined by inadequate regulatory frameworks that continue to allow activities that greatly impact on threatened species and their habitat.

More could be done to improve the interaction of the SoS program and the legal frameworks regulating activities on land such as urban development and land clearing. For example, the BC Act should give elements of the SoS program,⁵⁵ including the Iconic Koala Project, more meaningful legislative effect. This will help to ensure the NSW Government achieves the SoS aim to ‘secure the koala in the wild in NSW for 100 years.’⁵⁶ To do so the BC Act should:

- impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
- require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
- make clear that SoS sites (outside national parks and reserves) are AOBVs; and
- fund these AOBVs for protection and make them off-limits from harm – including from mining interests (which otherwise continue to override biodiversity protection).

4. Part 4 Development

4.1 Introduction

The undertaking of development is regulated, generally, under Part 4 of the EP&A Act.⁵⁷ Procedural requirements relating to environmental assessment, public notification and appeal rights, and

⁵⁴ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/saving-our-species-program/threatened-species-conservation/iconic-species>

⁵⁵ As established in Part 4, Division 6 of the *Biodiversity Conservation Act 2016*

⁵⁶ *Securing the Koala in the wild in NSW for 100 years Saving Our Species Iconic Koala Project 2017–21*, available at www.environment.nsw.gov.au/research-and-publications/publications-search/saving-our-species-iconic-koala-project-2017-to-2021

⁵⁷ Section 1.5 of the EP&A Act provides:

For the purposes of this Act, *development* is any of the following—
(a) the use of land,



mechanisms for assessing and managing impacts on koalas, will differ depending on the relevant assessment and determination pathway.

This section considers each of the following:

- Exempt development (4.2)
- Complying development (4.3)
- Local and regionally significant development (4.4)
- State Significant Development (4.5)
- Koala SEPPs (4.6)
- Biodiversity certification (4.7)

4.2 Exempt Development

4.2.1 Overview

Exempt development is minor development that does not require planning approval under the EP&A Act. It can include things like decks, garden sheds, fences, and house repairs. In order to be exempt development, the development must meet the requirements of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Exempt and Complying Development SEPP)*.⁵⁸

4.2.2 Key issues for koalas

Exempt development should not be allowed in koala habitat. Instead, development that would impact on koala habitat should require robust environmental assessment and development consent. However, the Exempt and Complying Development SEPP does not explicitly exclude exempt development in koala habitat.⁵⁹ That said, to be exempt development, the development

-
- (b) the subdivision of land,
 - (c) the erection of a building,
 - (d) the carrying out of a work,
 - (e) the demolition of a building or work,
 - (f) any other act, matter or thing that may be controlled by an environmental planning instrument.

⁵⁸ Further information about exempt development is available on the Department of Planning and Environment's website: <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Exempt-development>

⁵⁹ See, for example, clause 1.16 of the Exempt and Complying Development SEPP which states that exempt development must not be carried out on land:

- that is a declared area of outstanding biodiversity value under the *Biodiversity Conservation Act 2016* or declared critical habitat under Part 7A of the *Fisheries Management Act 1994*,
- that is, or is part of, a wilderness area (within the meaning of *Wilderness Act 1987*)
- that is, or on which there is, an item that is listed on the State Heritage Register under the *Heritage Act 1977*, or that is subject to an interim heritage order under that Act, and
- that is described or otherwise identified on a map specified in Schedule 4. (Schedule 4 currently lists exempt development maps for areas in the Botany Bay and Wyong local government areas).

See also clause 1.17A(1) of the Exempt and Complying Development SEPP which states that to be complying development for the purposes of any environmental planning instrument, the development must not—



must not involve the removal or pruning of a tree or other vegetation that requires a permit, approval or development consent, unless the removal or pruning is carried out in accordance with the permit, approval or development consent.⁶⁰ It should not be presumed that these provisions are enough to comprehensively protect koalas and koala habitat. Indeed, the Exempt and Complying Development SEPP contains specific, additional provisions relating to the installation of fences in areas of koala habitat.⁶¹ This is presumably because while the construction of fences may not require the removal of trees (and therefore not trigger the tree permit provisions), it may otherwise impact on koalas and koala habitat by fragmenting vegetation.

4.3 Complying development

4.3.1 Overview

Complying development is simple development that can be fast-tracked because it complies with the relevant provisions of the Exempt and Complying Development SEPP. It can include things like new houses, house renovations, new industrial buildings, or demolition of certain buildings. In order to carry out complying development, you must obtain, and the development must be carried out in accordance with, a complying development certificate.⁶²

If development involving the removal or pruning of a tree or other vegetation requires a permit, approval or development consent, that must be obtained before the complying development certificate is issued.⁶³

Additionally, the Exempt and Complying Development SEPP states that to be complying development (for the purposes of the SEPP), the development must not be on land that is within an

-
- a) be development for which development consent cannot be granted except with the concurrence of a person other than—
 - i. the consent authority, or
 - ii. the Director-General of the Department of Environment, Climate Change and Water as referred to in section 4.13(3) of the Act, or
 - b) be on land that is critical habitat, or
 - c) be on land that is, or is part of, a wilderness area (within the meaning of the Wilderness Act 1987), or
 - d) be carried out on land that—
 - i. comprises an item that is listed on the State Heritage Register under the Heritage Act 1977 or on which such an item is located, or
 - ii. is subject to an interim heritage order under that Act or on which is located an item that is so subject, or
 - iii. is identified as an item of environmental heritage or a heritage item by an environmental planning instrument or on which is located an item that is so identified, or
 - e) except as otherwise provided by this Policy, be on land that is within an environmentally sensitive area.

⁶⁰ *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, cl 1.16(3)(b).

⁶¹ See, for example:

- provisions relating the construction of fences in certain residential zones and Zone RU5 (cl 2.34), in certain rural zones, environment protection zones and Zone R5 (cl 2.36) and in business and industrial zones (2.38).

⁶² Further information about complying development is available on the Department of Planning and Environment's website: <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Complying-development>

⁶³ *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, cl 1.18(1)(h).



environmentally sensitive area.⁶⁴ Additionally, clause 1.19 of the Exempt and Complying Development SEPP provides that for the purpose of the certain specific codes,⁶⁵ complying development must not be carried out within land identified in an environmental planning instrument as either an ecologically sensitive area, or environmentally sensitive area.

Environmentally sensitive area is defined in clause 1.5 of the Exempt and Complying Development SEPP. It does not explicitly include koala habitat. It does, however, include land identified in it or any other environmental planning instrument as being of “high biodiversity significance”. Neither the terms ecologically sensitive area or high biodiversity significance are defined in the SEPP, but are given effect by being identified in an environmental planning instrument.

These provisions allow Environmental Planning Instruments (**EPIs**)⁶⁶ to explicitly identify koala habitat as being excluded from exempt and complying development. This has been utilised by some councils, for example:

- Clause 7.5(5) of the *Port Macquarie-Hastings Local Environmental Plan 2011* states that “Land shown as ‘koala habitat area’ on the Koala Habitat Map is identified as being within an ecologically sensitive area for the purposes of clause 1.19 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*”.
- Clause 3.3(2)(jd) of *Campbelltown Local Environmental Plan 2015* provides that environmentally sensitive area for exempt or complying development includes “land on part of Lot 4 and part of Lot 5, DP 1240836 identified as “Koala Corridor” on the *Clause Application Map*”.

4.3.2 Key issues for koalas

While from a general perspective, koala habitat may be understood as being of high biodiversity significance or an ecologically or environmentally sensitive area, the drafting of the Exempt and Complying Development SEPP appears to rely on koala habitat being identified as such in an EPI in order to be captured. That is, koala habitat is not explicitly captured within the definitions of high biodiversity significance or an ecologically or environmentally sensitive area.

The rules relating to exempt and complying development as they relate to koala habitat are also overly complicated. Given that all development impacting on koala habitat should require robust environmental assessment, the Exempt and Complying Development SEPP should contain a specific exclusion for koala habitat (i.e. that exempt and complying development cannot be carried out in koala habitat). This would then allow impacts on koala habitat to be assessed and managed under a more appropriate assessment pathway. In order to effectively implement this, koala habitat must be able to be adequately identified, for example, through consistent, comprehensive mapping of koala habitat.

⁶⁴ *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, cl1.17A(1)(e).

⁶⁵ Housing Code, Inland Code, Low Rise Housing Diversity Code, Rural Housing Code and Greenfield Housing Code.

⁶⁶ Legal instruments made under the EP&A Act.



4.4 Local and regionally significant development

4.4.1 Overview

In general, Part 4 development requires consent by a council or other public authority specified as the consent authority (including by a local planning panel). Regionally significant development requires consent by a Sydney district or regional planning panel. Some Part 4 development may also be categorised as integrated development, designated development or advertised development.⁶⁷

4.4.2 Key issues for koalas

There is no absolute protection for koala habitat under Part 4 of the EP&A Act. That is, koala habitat is not off limits to development. Instead, there are a number of key mechanisms for assessing and managing impacts on koalas under Part 4 of the EP&A Act, including mechanisms established by the BC Act.

Those under the BC Act include:

- **Biodiversity assessment requirements:** Section 7.7 of the BC Act provides that if proposed development is likely to significantly affect threatened species, the application for development consent is to be accompanied by a BDAR.
- **BOS:** If the BOS is triggered,⁶⁸ the conditions of the consent must require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values of the number and class specified in the BDAR,⁶⁹ although the consent authority may vary the number of biodiversity credits that would otherwise be required to be retired.⁷⁰
- **Serious and irreversible impacts safeguard:** If a development proposal will have SII on threatened species, it must be refused.⁷¹

Key concerns with these mechanisms are outlined in Part 3.

⁶⁷ Generally:

- Designated Development refers to developments that are high-impact developments (e.g. likely to generate pollution) or are located in or near an environmentally sensitive area.
- Integrated development requires approval to be obtained from other public authorities (e.g. the EPA) before consent can be granted.
- Advertised development requires the consent authority to give the public notice of the development application, and includes threatened species development (development affecting threatened species which requires a species impact statement).

For more information see <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Local-development>

⁶⁸ As note in Part 3, for Part 4 development, if the proposed development is likely to significantly affect threatened species, the application for development consent is to be accompanied by a biodiversity development assessment report and the BOS applies. Development is likely to significantly affect threatened species if:

- it is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test '5-part test' in section 7.3 of the BC Act, or
- the development exceeds the biodiversity offsets scheme threshold,⁶⁸ or
- it is carried out in a declared area of outstanding biodiversity value.

⁶⁹ BC Act, s 7.7(3)

⁷⁰ BC Act, s 7.7(4)

⁷¹ BC Act, s 7.16(2).



Protections under the EP&A Act include, for example:

- **Land use zoning:** Land use zones are identified in local environmental plans (**LEPs**) prepared by councils for their LGA. Land use zones are used to categorise land and specify what type of development activities can be carried out in that land use zone without consent, with consent, or those activities which are prohibited. Conservation zones (previously known as environmental zones) are used to classify land for the purpose of conserving the environmental values and natural qualities in areas where this land use zoning is applied. Councils may choose to use conservation zones as a way to identify and protect known areas of koala habitat and are encouraged to do so under the Koala SEPP.⁷² Councils are also able to identify permissible and prohibited development using appropriate land use zones.
- **State Environmental Planning Policies:** State environmental planning policies (**SEPPs**) are EPIs made under the EP&A Act.⁷³ They are used to address planning issues in NSW. SEPPs can apply to certain areas of land or certain types of development. Presently, two different sets of rules apply to koalas as set out in Chapters 3 and 4 of *State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)* – see Part 4.5 below.
- **Planning controls and consent conditions:** In this context, planning controls are used to describe measures put in place, often at the strategic planning phase, to manage and regulate impacts of development. Examples of planning controls can include, for example, land use zoning, identification of permissible and prohibited development, and planning controls in Development Control Plans (**DCPs**).

DCPs provide detailed planning and design guidelines to support the planning controls in the LEP developed by a council.⁷⁴ DCPs could include specific provisions relating to development that may impact on koalas, see, for example, **Case Study 1 – Koala Beach, Tweed Shire LGA**.

Planning controls can also be included in KPoMs. For example, clause 6.4 of the Campbelltown KPoM outlines detailed development controls, which include:

- Requirements to retain koala food trees and shelter trees;
- A requirement that all new swimming pools must incorporate a design component such as a shallow ramp or other feature that will enable egress by koalas; and/or a stout rope (> 50 mm diameter), one end of which must be secured to a stable poolside fixture, the other end of which must trail in the pool;
- Restrictions on the keeping of domestic dogs;

⁷² Koala SEPP 2020, cl 3.13; When Koala SEPP 2019 was introduced the Government equivalent requirements would be included in a Ministerial Planning Direction. This does not appear to have occurred – see the Ministerial Directions as at 1 March 2022: <https://www.planning.nsw.gov.au/-/media/Files/DPE/Directions/Ministerial-Directions-commenced-on-1-March-2022.pdf?la=en>

⁷³ EP&A Act, Part 3, Division 3.3.

⁷⁴ <https://pp.planningportal.nsw.gov.au/DCP>



- Requirements that fencing of residential lots must not impede the movement of koalas; and
- Road design standards and/or approved vehicle calming devices (eg speed humps; and roundabouts, chicanes and wildlife activated signage) incorporated on any new roads created through residential subdivision with a maximum speed of 40km/hr.

Moreover, under the EP&A Act, consent authorities have broad powers to impose conditions of consent, including in relation to the likely impacts of that development, including environmental impacts.⁷⁵ Conditions of consent may be used to implement planning controls (for example, those found in KPoMs or DCPs), implement biodiversity offsetting requirements, or otherwise manage impacts on koalas. For example, in granting approval to the Brandy Hill Quarry, the NSW Independent Planning Commission (IPC) indicated that it had imposed a condition which restricts truck movements at night and before 6.00am to reduce the threat to koala safety.⁷⁶

Case Study 1– Koala Beach, Tweed Shire LGA

The Koala Beach housing estate on the North Coast of NSW illustrates how planning controls can be used to manage impacts of development on koalas.⁷⁷ The detailed planning controls for Koala Beach were incorporated into a KPoM which was prepared for the developer by the Australian Koala Foundation. The Planning Controls are also incorporated in Tweed Shire Council’s DCP.⁷⁸

Examples of planning controls incorporated in the DCP include:

- measures to protect primary Koala browse trees, home range trees and where possible, other trees utilised by koalas;
- requirements for speed control devices;
- road signs and awareness messages;
- fence design;
- prohibition of cats or dogs within the estate.

The Australian Koala Foundation reports that:⁷⁹

- After years of development, koalas still live in safety at Koala Beach, and that the descendants of koalas that lived at the site back in 1994 (when baseline surveys were undertaken) can still be found there today.

⁷⁵ EP&A Act, s 4.17

⁷⁶ See NSW Independent Planning Commission, *Brandy Hill Quarry Expansion Project SSD 5899 - Statement of Reasons for Decision* at [165] < <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/05/brandy-hill-quarry-expansion-project-ssd-5899/determination/brandy-hill-quarry-expansion-statement-of-reasons.pdf?>>; see also Condition A12 of the Development Consent <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/05/brandy-hill-quarry-expansion-project-ssd-5899/determination/brandy-hill-quarry-expansion-development-consent.pdf>

⁷⁷ See <https://www.savethekoala.com/our-work/koala-beach-housing-development/#:~:text=Koala%20Beach%20Housing%20Development%20The%20Australian%20Koala%20Foundation,so%20that%20it%20can%20co-exist%20with%20wild%20Koalas>

⁷⁸ See Tweed Development Control Plan, Section B10. Koala Beach < <https://www.tweed.nsw.gov.au/development-business/land-use-planning-controls/environment-control-plans/development-control-plan#section-b>>

⁷⁹ See <https://www.savethekoala.com/our-work/koala-beach-housing-development/>



- Every single food tree and home range tree has been retained; and additional trees have been planted.
- Council and Koala Hospital records show very little evidence that two key koala threats associated with development—cars and dogs— have affected the local population.

4.5 State Significant Development

4.5.1 Overview

Generally, SSD includes large-scale or complex projects that may involve significant environmental impacts. A development can become SSD in one of two ways:

- it can be declared to be SSD under a SEPP; or
- it can be declared to be SSD by order of the Minister for Planning.

A list of categories of development and specific sites declared as SSD can be found in Schedule 1 and Schedule 2 of *State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP)*.

SSD is Part 4 development, but specific additional assessment and determination requirements apply to SSD, including those set out in Division 4.7 of the EP&A Act. The consent authority for SSD is either the Minister for Planning or IPC. It is noted that third-party merit appeal rights may be limited in some instances where there has been a public hearing of the IPC.⁸⁰

4.5.2 Key issues for koalas

Many of the mechanisms described above are relevant to SSD, but are applied differently. For example:

- **Biodiversity assessment requirements:** Any application for SSD or SSI must be accompanied by a BDAR unless the Planning Agency Head and the Environment Agency Head determine that the proposed development is not likely to have any significant impact on biodiversity values.⁸¹
- **BOS:** If the BOS is triggered,⁸² the conditions of the consent must require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values of the number

⁸⁰ EP&A Act, s 8.6(3)(b)

⁸¹ BC Act, s 7.9.

⁸² As note in Part 3, for Part 4 development, if the proposed development is likely to significantly affect threatened species, the application for development consent is to be accompanied by a biodiversity development assessment report and the BOS applies. Development is likely to significantly affect threatened species if:

- it is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test '5-part test' in section 7.3 of the BC Act, or
- the development exceeds the biodiversity offsets scheme threshold,⁸² or
- it is carried out in a declared area of outstanding biodiversity value.



and class specified in the BDAR,⁸³ although the consent authority may vary the number of biodiversity credits that would otherwise be required to be retired.⁸⁴

- **Serious and irreversible impacts safeguard:** If an SSD proposal will have SII on threatened species, a consent authority must take those impacts into consideration and determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.⁸⁵ However, unlike other Part 4 development, the consent authority is not required to refuse the application.

In essence, there is more flexibility for decision makers in assessing and determining SSD applications than other Part 4 applications. This does not accord with the premise that projects likely to have the most impact (such as SSD) should be subject to the greatest scrutiny and objective decision-making processes. In our experience, with such discretionary decision-making, the interests of development proponents often trump the interests of koalas.

Further, the restriction of third-party merit appeal rights where there has been a public hearing of the IPC reduces oversight and accountability of decision making. EDO's report *Merits Review in Planning in NSW*⁸⁶ outlines the important public benefits of third party appeal to the Land and Environment Court against development consents for high impact development.

4.6 Koala SEPPs

4.6.1 Overview

Presently, two different sets of rules apply to the assessment and determination of development proposals by councils, as set out in Chapters 3 and 4 of the Biodiversity and Conservation SEPP:

- Chapter 3 – Koala Habitat Protection 2020 (**Koala SEPP 2020**) applies to rural zones (RU 1, 2 and 3) in 74 LGAs out of 83 relevant LGAs (but not rural zones in nine metropolitan LGAs across Sydney, the Blue Mountains and the Central Coast where Koala SEPP 2021 will apply across all zones).
- Chapter 4 - Koala Habitat 2021 (**Koala SEPP 2021**) applies to all zones in nine metropolitan LGAs across Sydney, the Blue Mountains and the Central Coast; and all zones other than RU1, 2 and 3 in all other 74 listed LGAs.

For the purpose of this report, the term Koala SEPP/s is used to refer generally to any Koala SEPP that has been or is currently in force. Where specific references are required, the specific Koala SEPP will be identified.

⁸³ BC Act, s 7.7(3)

⁸⁴ BC Act, s 7.7(4)

⁸⁵ BC Act, s 7.16(3) and (4).

⁸⁶ Environmental Defenders Office, *Merits Review in Planning in NSW*, 2016 <

https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2998/attachments/original/146777537/EDO_NSW_Report_-_Merits_Review_in_Planning_in_NSW.pdf?146777537>



The two sets of rules are the product of the political ‘koala wars’ – a time of upheaval in the NSW government relating to the updating and implementation of a new Koala SEPP in 2019. See **Box 1 – The NSW Koala Wars**.

Box 1 – The NSW Koala Wars

On 1 March 2020, former NSW *State Environmental Planning Policy No 44 – Koala Habitat Protection* (**SEPP 44**), which had been in place since 1995, was repealed and replaced by a new *State Environmental Planning Policy (Koala Habitat Protection) 2019* (**Koala SEPP 2019**).⁸⁷

However, in late 2020, after two Nationals MPs threatened to quit the NSW government due to issues with Koala SEPP 2019,⁸⁸ the Government attempted to make changes to both Koala SEPP 2019 and the *Local Land Services Act 2013* (**LLS Act**) to change the way koala protections applied to rural land.⁸⁹ In particular, it intended to ‘decouple’ the LLS Act from the Koala SEPP.⁹⁰ The Government’s proposed changes were defeated after a principled crossing of the floor by then Liberal MP Catherine Cusack, concerned that the changes represented a weakening of protections for koalas.⁹¹

Having failed to implement its proposed changes, the NSW Government abandoned Koala SEPP 2019 after it had been in operation for less than 12 months. It put in place *State Environmental Planning Policy (Koala Habitat Protection) 2020* (**Koala SEPP 2020**) – which mirrored many of the policy settings of former SEPP 44 – as an interim measure, with plans for a new Koala SEPP to be developed in 2021.

Subsequently in March 2021, the Government introduced *State Environmental Planning Policy (Koala Habitat Protection) 2021* (**Koala SEPP 2021**), which largely reinstates the policy framework of the 2019 Koala SEPP. However, it does not apply across the board. Koala SEPP 2020 (modelled off Koala SEPP 44) continues to apply to some rural zones. That is, the updated Koala SEPP rules do not apply in certain rural zones.

The Government indicated that two Koala SEPPs were temporary, announcing that it still intended to remove links between the Koala SEPPs and both the land management framework and private native forestry (**PNF**) framework, after which time Koala SEPP 2020 would be repealed and Koala SEPP 2021 would apply uniformly to all relevant LGAs.⁹²

In November 2022, the Government again attempted to legislate to remove links between the Koala SEPP and the PNF framework through the *Environmental Planning and Assessment*

⁸⁷ See <https://www.edo.org.au/2020/02/20/koalas-nsw-new-laws-old-tricks/>

⁸⁸ See The Guardian, Nationals MPs threaten to quit NSW government unless koala protection watered down, 3 September 2020, available at <https://www.theguardian.com/environment/2020/sep/03/nationals-mps-threaten-to-quit-nsw-government-unless-koala-protection-watered-down>

⁸⁹ See Land Services Amendment (Miscellaneous) Bill 2020 <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3805>>

⁹⁰ The key link between the Koala SEPP and Part 5A of the LLS Act is through the adoption of the concept of core koala habitat.

⁹¹ See <https://www.edo.org.au/2020/11/20/controversial-nsw-koala-bill-defeated-by-single-vote/>

⁹² See <https://www.planning.nsw.gov.au/News/2021/NSW-Government-delivers-Koala-SEPP-2021>; see also <https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/Frequently-Asked-Question--State-Environmental-Planning-Policy-Koala-Habitat-Protection-2021.pdf?la=en>



Amendment (Private Native Forestry) Bill 2022. However, after considerable backlash by both the community and independent and some Coalition MPs in the NSW Parliament,⁹³ it indicated it would not proceed with the Bill. Anticipated changes to the land management framework have also not eventuated.

At the start of 2023, both Koala SEPP 2020 and Koala SEPP 2021 remain in place. These have been consolidated as Chapter 3 and 4 respectively of the Biodiversity and Conservation SEPP.

The failure of the Government to effectively resolve outstanding issues and put in place a single, permanent framework has delayed the effective implementation of important koala protections – see for example, **Case Study 4 – Implications of dual Koala SEPPS – Coffs Harbour LGA**

4.6.2 Key issues for koalas

The Koala SEPPs do not prohibit development in koala habitat. Rather, in general, the Koala SEPPs:

- outline additional assessment requirements for proponents and additional considerations to be taken into account by councils when assessing development proposals that will impact on koala habitat; and
- provide a mechanism for councils to map core koala habitat in a KPOM.

Additionally, the Koala SEPPs only apply to Part 4 development for which a council is the consent authority. They do not directly apply to other types of development and activities (including infrastructure) that can impact on koala habitat, including complying development, major projects (SSD and SSI), Part 5 activities (e.g. activities undertaken by public authorities) and land clearing activities requiring approval under the LLS Act – see **Box 2- Interaction between Koala SEPP 2020 and Koala SEPP 2021, SSD and Part 5 activities**.

Box 2 - Interaction between Koala SEPP 2020 and Koala SEPP 2021, SSD and Part 5 activities.

SSD

The operative provisions of both Koala SEPP 2020 and Koala SEPP 2021 apply to the determination of a development application by a *council*. Drafted in this way, it would seem that the Koala SEPP 2020 and Koala SEPP 2021 have no direct application to the assessment and determination of SSD – as it is the Minister or IPC, and not the council, that is the consent authority for SSD.

That said, in practice, some Secretary's Environmental Assessment Requirement's (**SEARs**) have required SSD to be assessed having regard to the relevant Koala SEPP. For example, *Indicative Environmental Assessment Requirements (SEARs) for state significant mining developments*,

⁹³ See The Guardian, 'Koala wars': NSW government scraps contentious native forestry bill to head off revolt, 14 November 2022, available at <https://www.theguardian.com/australia-news/2022/nov/14/koala-wars-nsw-government-scraps-contentious-native-forestry-bill-to-head-off-revolt>



October 2015, noted that former SEPP 44 was a relevant government policy for the purpose of biodiversity assessment of state significant mining projects.

Recently issued SEARs for certain projects have also noted the Koala SEPP may be relevant to or explicitly required for the assessment of impacts to koalas and koala habitat in accordance with the Koala SEPPs, see, for example:

- Chain Valley Colliery Consolidation Project⁹⁴
- Bowdens Silver Project⁹⁵
- Western Slopes Gas Pipeline⁹⁶
- McPhillamys Gold Project⁹⁷

Yet, newly released industry specific indicative SEARs do not reference the Koala SEPP.⁹⁸

Part 5 activities

The operative provisions of both Koala SEPP 2020 and Koala SEPP 2021 apply to the determination of a *development application*. Because Part 5 activities (including SII and CSII) are not development requiring development consent, the Koala SEPP does not apply. Consistent with this, neither the *Guidelines for Division 5.1 assessments*⁹⁹ or *Critical State Significant Infrastructure Standard Secretary's Environmental Assessment Requirements (SEARs)*¹⁰⁰ refer to the Koala SEPP.

Some improvements were made to the policy settings of the Koala SEPP in 2019, and are now reflected in Koala SEPP 2021. Significantly, the definition of 'core koala habitat' has been updated, as has the list of feed tree species in Schedule 2, used to help identify koala habitat. It has been expanded from 10 species to 123 species, categorised into 9 distinct regions. However, the application of protections for core koala habitat is limited due to the failure to comprehensively map core koala habitat – see **Box 3 - Core Koala Habitat**.

⁹⁴ <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-17017460%2120220308T030920.895%20GMT>

⁹⁵ <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-5765%2120190626T063908.406%20GMT>

⁹⁶ <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSI-8272%2120210625T033611.750%20GMT>

⁹⁷ <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120190830T014518.693%20GMT>

⁹⁸ See <https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-reforms/Rapid-Assessment-Framework/Streamlining-major-project-assessment>

⁹⁹ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/Policy-and-legislation/SSI-Guidelines/Guidelines-for-Division-51-assessments.pdf?la=en>

¹⁰⁰ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/critical-state-significant-infrastructure-standard-secretarys-environmental-assessment-requirements-SEARs-2015-12.ashx>



Box 3 - Core koala habitat

The concept of core koala habitat has its origin in the Koala SEPPs.

The Koala SEPPs allow relevant local councils to prepare KPoMs that identify core koala habitat and set out specific planning provisions relating to the assessment and determination of proposals carried out in core koala habitat.

Core koala habitat is a legally defined term in the Koala SEPPs. Currently:

- SEPP 2020 defines core koala habitat as “*an area of land with a resident population of koalas, evidenced by attributes such as breeding females, being females with young, and recent sightings of and historical records of a population*”.
- The definition of core koala habitat was updated following the review of the Koala SEPP, and an updated definition is included in SEPP 2021, which defines core koala habitat as:
 - a) “*an area of land which has been assessed by a suitably qualified and experienced person as being highly suitable koala habitat and where koalas are recorded as being present at the time of assessment of the land as highly suitable koala habitat, or*
 - b) *an area of land which has been assessed by a suitably qualified and experienced person as being highly suitable koala habitat and where koalas have been recorded as being present in the previous 18 years*”.

While core koala habitat is a concept established by the Koala SEPPs, the idea of core koala habitat is picked up in other legal frameworks, which generally define core koala habitat as identified in a KPoM. For example:

- Under Part 5A of the LLS Act core koala habitat identified in an approved KPoM must be designated as category 2 regulated land for the purpose of the Native Vegetation Regulatory Map (**NVR Map**),¹⁰¹ and specifically category 2 – sensitive regulated land.¹⁰² Code-based clearing cannot be undertaken on category 2 – sensitive regulated land (that is, any rural land clearing of core koala habitat must be assessed and determined by the Native Vegetation Panel (**NVP**)).
- Core koala habitat identified in a KPoM is a type of land identified on the Biodiversity Values Map (**BV Map**) under the BC Act. The BV Map forms part of the BOS threshold, which is one of the factors for determining whether the BOS applies to a clearing or development proposal.
- Under former Private Native Forestry Codes of Practice (**PNF Codes**) (now repealed), PNF was prohibited from occurring in areas of core koala habitat within the meaning of the Koala SEPPs. However, in recent efforts to ‘decouple’ PNF from the Koala SEPPs, new PNF Codes no longer rely on core koala habitat mapped in a KPoM; instead separate PNF core koala habitat is identified in new PNF Codes (see Part 8 below). There is nothing in the LLS Act or PNF Codes that explicitly define core koala habitat.

¹⁰¹ LLS Act, s 60I(2)(j), LLS Regulation, cl 111

¹⁰² LLS Regulation, cl 108(2)(b)



One of the current limitations with the application of core koala habitat is that only a limited number of councils have approved KPoMs.¹⁰³ This has a number of implications:

- In terms of applying Koala SEPP 2020, if no comprehensive KPoM is in place a site specific KPoM will be required to be put in place for a specific site before development can proceed.¹⁰⁴
- For the purpose of Koala SEPP 2021, if no KPoM is in place, cl 4.9 applies, requiring councils to determine whether there will be low or no impact on koalas or koala habitat or a higher level of impact, and in the latter case consider a koala assessment report. Additionally, guidelines that are intended to apply have not yet been finalised.
- For the purpose of the LLS Act, it means a limited amount of koala habitat is designated as category 2 sensitive land. Any other koala habitat may be able to be cleared under the Land Management Code.
- For the purpose of PNF Codes, only core koala habitat mapped at the time the new Codes were introduced is exempt from PNF.

Additionally, a koala population was recently discovered in the Sutherland LGA, however neither Koala SEPP 2020 nor Koala SEPP 2021 apply in Sutherland LGA, meaning that protections provided by the Koala SEPP have no application in that area – see **Case Study 2 - Falling through the cracks: Koalas in the Sutherland Shire.**

Essentially, the failure of councils to have approved KPoMs in place identifying core koala habitat means that protections intended to apply to core koala habitat are limited in application.

Although there is an updated definition of ‘core koala habitat’ in Koala SEPP 2021, concern remains that the definition is linked to confirmed occupancy (i.e. confirmed koala sightings), meaning that some important koala habitat may not be captured, including koala habitat that has not been recently or regularly surveyed or mapped as core koala habitat, or habitat that may be needed as future climate refugia. We also note that koala habitat can have high or low-density populations depending on the vegetation.

For the purpose of this report, unless we are talking specifically about core koala habitat (as understood with reference to existing laws), we use the term koala habitat generally to mean koala habitat that should attract legal protection (using the various mechanisms described in this report). We recommend that a scientifically robust, and clearly defined definition of koala habitat be applied consistently across various legal frameworks to maximise protections for koalas.

¹⁰³ According to a Department of Planning and Environment Fact Sheet issued in March 2021, only 9 LGAs have approved KPoMs, namely: Ballina, Bellingen, Campbelltown, Coffs Harbour, Kempsey, Lismore, Port Stephens, Byron, and Tweed <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/Frequently-Asked-Question--State-Environmental-Planning-Policy-Koala-Habitat-Protection-2021.pdf?la=en>>

¹⁰⁴ Koala SEPP 2020, cl 3.8, cl 3.10.



Case study 2 – Falling through the cracks: Koalas in the Sutherland Shire

A recent development proposal at Woronora Heights in Sutherland LGA has highlighted a significant gap in the NSW Koala SEPPs. Koalas have been recorded and sighted in the region,¹⁰⁵ yet Sutherland LGA is not listed as a LGA to which the Koala SEPP 2021 (nor Koala SEPP 2020) applies – meaning the Koala SEPP would have no application in the assessment and determination of development proposals in the area.

Sydney Water had recently proposed a subdivision of 33.04 hectares of a vacant bush land block for the purpose of building residential dwellings at 22 Bundanoon road, Woronora Heights.¹⁰⁶ The developer's reports estimated that there is likely to be 1.523 hectares of disturbance across the 33.04 hectares, and noted that koalas were recorded within 10 km of the site.¹⁰⁷ It was also claimed the site was an important corridor.

While the application has since been withdrawn, the process highlighted a number of key issues:

- Despite evidence of koalas in the areas, Sutherland LGA is not listed as an LGA to which the Koala SEPP 2021 (nor Koala SEPP 2020) applies, meaning protections for koalas provided by the SEPP do not apply in the Sutherland LGA.
- While koalas were not identified in surveys on the site, the BDAR noted that koala habitat was present. However, because Koala SEPP 2021 had no application, no further consideration was given as to whether this would be 'core koala habitat.'
- While Sutherland Shire Council has formed a Sutherland Koala Steering Committee to provide strategic direction on koala conservation and intends to prepare a Koala Management Plan,¹⁰⁸ it would not be able to be finalised and enforced until Sutherland LGA is listed in the Koala SEPP.
- We have seen no indication of the developer referring the proposal for assessment under the EPBC Act by the Commonwealth government. It is unclear if this was an oversight, or if the developer formed the view that the proposed development would not have a significant impact on a matter of national environmental significance.¹⁰⁹

¹⁰⁵ See information collated by Sutherland Shire Environment Centre, available at <https://www.ssec.org.au/our-campaigns/koalas-and-resilient-habitat-in-the-sutherland-shire/>; see also 9News, *NSW citizen scientists discover koala populations in Sutherland Shire*, 3 May 2022 <<https://www.9news.com.au/national/koalas-nsw-habitats-citizen-scientists-discover-koalas-in-sydney-sutherland-shire/8f3de71e-f6f0-4177-92cd-03e237fc5b8c>>; see also NSW BioNet, <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/nsw-bionet>

¹⁰⁶

<https://propertydevelopment.ssc.nsw.gov.au/T1PRProd/WebApps/eProperty/P1/eTrack/eTrackApplicationDetails.aspx?r=SSC.P1.WEBGUEST&f=%24P1.ETR.APPDET.VIW&ApplicationId=DA21%2F0336>

¹⁰⁷ Biodiversity Development Assessment Report, Sydney Water, 22 Bundanoon Road, Woronora Heights, Subdivision Stage 1, December 2020, pp 7 and 19 <

[https://propertydevelopment.ssc.nsw.gov.au/PublicEPropertyPDF/DA210336%20Biodiversity%20Development%20Assessment%20Report%20\(BDAR\)%20-%20%5bA7475460%5d.pdf](https://propertydevelopment.ssc.nsw.gov.au/PublicEPropertyPDF/DA210336%20Biodiversity%20Development%20Assessment%20Report%20(BDAR)%20-%20%5bA7475460%5d.pdf)>

¹⁰⁸ Sutherland Shire Council, *Additional Reports, Council Meeting*, 31 October 2022, p 4

<<https://cms.ssc.nsw.gov.au/files/sharedassets/website/document-library/governance/council-meetings/2022-10-31-council-additional-report-mm016-22.pdf>>

¹⁰⁹ It is noted that the Commonwealth Department of Climate Change, Energy, the Environment and Water has updated its referral guidance for the endangered koala since its conservation status was upgraded from vulnerable to endangered in February 2022 – see <https://www.dcceew.gov.au/environment/biodiversity/threatened/publications/referral-guidelines-endangered-koala>



Notably, recent mapping of Areas of Regional Koala Significance (ARKS)¹¹⁰ identifies an ARKS extending into the Sutherland LGA, as well as ARKS extending into other LGAs in the SBB which are not currently listed in the Koalas SEPPs, including, for example, Penrith, Shellharbour and Canterbury-Bankstown.

There are still many deficiencies with the extent of protections provided by the Koala SEPPs. For example:

- **No areas of koala habitat are off-limits to clearing or offsetting** – NSW laws do not prohibit the clearing of koala habitat. Despite declining koala numbers and the devastation caused by the 2019/20 bushfires, NSW laws still allow koala habitat to be cleared with approval. The Koala SEPPs simply require decision-makers to ensure development approvals are consistent with KPoMs, or, in the case of Koala SEPP 2022, if a KPoM is not in place, take into account a koala assessment report. If our laws are to truly protect koalas and their habitats then the approval process must not allow important koala habitat to be offset or cleared in exchange for money, in the way that the NSW Biodiversity Assessment Method does. Rather, all development that has serious or irreversible impacts on koala habitat must be refused. This can be achieved by strengthening the existing ‘serious and irreversible impacts’ mechanism (see 3.3), or by identifying and protecting ‘no-go’ areas that are off limits to development or clearing (see, for example, the proposed ‘traffic light’ system to be implemented under the Commonwealth Government’s *Nature Positive Plan*¹¹¹ (see Part 12)).
- **The requirement for councils to prepare Comprehensive Koala Plans of Management remains voluntary** – Due to the slow uptake by councils, as noted above, only 9 LGAs had approved KPoMs in place by March 2021. EDO has previously recommended that the preparation of KPoMs be mandatory (i.e. the SEPP require that draft KPoMs be prepared and exhibited within a particular timeframe). As noted above, the failure to identify ‘core koala habitat’ in a KPoM means that protections that rely on the concept of ‘core koala habitat’ have limited application in practice.
- **Guidelines have not been finalised** – Additionally, guidelines that are intended to apply have not yet been finalised.¹¹²
- **The 1 hectare requirement has not been removed** – The arbitrary threshold of 1 ha for triggering SEPP 44 has been carried over to the Koala SEPP 2021. For the Koala SEPP to apply, the land the subject of the development must have an area of at least 1 ha (including

¹¹⁰ SEED, The Central Resource for Sharing and Enabling Environmental Data in NSW, Koala Habitat Information Base - Areas of Regional Koala Significance (ARKS) <
[https://geo.seed.nsw.gov.au/Public_Viewier/index.html?viewer=Public_Viewier&locale=en-AU&runWorkflow=AppendLayerCatalog&CatalogLayer=SEED_Catalog.233.Koala%20Habitat%20Information%20Base%20-%20Areas%20of%20Regional%20Koala%20Significance%20\(ARKS\)>](https://geo.seed.nsw.gov.au/Public_Viewier/index.html?viewer=Public_Viewier&locale=en-AU&runWorkflow=AppendLayerCatalog&CatalogLayer=SEED_Catalog.233.Koala%20Habitat%20Information%20Base%20-%20Areas%20of%20Regional%20Koala%20Significance%20(ARKS)>)

¹¹¹ <https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan>

¹¹² An editorial note following cl 4.1 of Koala SEPP states “Guidelines are being made by the Planning Secretary with the agreement of the Secretary of Regional NSW for the purposes of Parts 4.2 and 4.3 of this Chapter. When the Guidelines are made this Chapter is to be amended to incorporate references to the Guidelines”.



adjoining land within the same ownership).¹¹³ 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 ha requirement also contributes to cumulative impacts and can reduce connectivity across the landscape by allowing small patches to be cleared – See **Case Study 3 - Applying the Koala SEPP in St Helen’s Park, Campbelltown LGA.**

- **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 resident koala population in those areas now, however there is nothing in the new Koala SEPP 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 2021.

Case Study 3 – Applying the Koala SEPP in St Helen’s Park, Campbelltown LGA

In July 2021, a development application to subdivide land at 311 Appin Rd, St Helen’s Park, into 17 allotments was lodged with Campbelltown City Council.¹¹⁴ Koalas are known to populate the Campbelltown region. According to the Council’s website, the majority of Campbelltown’s koalas are found within the suburbs of Macquarie Fields, Long Point, Ingleburn, Minto Heights, Kentlyn, Ruse, Leumeah, Airs, Rosemeadow, St Helens Park and Wedderburn.¹¹⁵ Koalas have been known to venture into populated areas in St Helens Park.¹¹⁶ An approved KPoM is in place for the Campbelltown LGA. At the time the development application was lodged, both Koala SEPP 2020 and Koala SEPP 2021 were in force. It is our understanding that Koala SEPP 2021 applies to all zones in Campbelltown LGA and that Koala SEPP 2020 has no application in Campbelltown LGA.¹¹⁷

An earlier (June 2021) development/subdivision application was rejected by Council, as Council required the proponent to address a number of issues, including an assessment regarding Koala SEPP 2021.

The Statement of Environmental Effects accompanying the new application in July 2021:

- Mistakenly applied Koala SEPP 2020;

¹¹³ Koala SEPP 2021, cl 4.9.

¹¹⁴ 2299/2021/DA-SW. The application can be found on the Council’s website by searching the site address, 311 Appin Road, St Helens Park:

<https://ebiz.campbelltown.nsw.gov.au/ePathway/Production/Web/GeneralEnquiry/EnquirySearch.aspx?js=-1169862092>

¹¹⁵ See

<https://www.campbelltown.nsw.gov.au/LocalEnvironment/Koalatown/KoalasInCampbelltown/KoalaLocations#:~:text=The%20majority%20of%20our%20koalas,St%20Helens%20Park%20and%20Wedderburn.>

¹¹⁶ 9 News, *Naughty’ koala found stuck on top of roof in Sydney’s south-west*, 2 September 2021

<https://www.9news.com.au/national/koala-rescued-from-top-of-roof-in-sydneys-south-west-animal-news/42b617d1-49bd-4058-a8eb-471eebd7b0f4>

¹¹⁷ See cl 4.4 and Schedule 2 of the Biodiversity and Conservation SEPP



- Claimed the subject site has an area of 9513m² and it, therefore, would not trigger the Koala SEPP (we note that neither Koala SEPP 2020 nor Koala SEPP 2021 applies to areas of less than 1 ha);
- Stated that an assessment of the tree species suggested there are no trees that are feed trees on the site. However, it appears that Koala SEPP was incorrectly applied for the purpose of the assessment. “Feed trees” is a concept used under Koala SEPP 2020. Under Koala SEPP 2021, a list of koala use trees must be considered.

The application demonstrates that both the confusion caused by dual Koala SEPPs, and the arbitrary application of the 1 ha rule, may lead to applications falling through the cracks, even in areas known to be used by koalas. In an area like Campbelltown, multiple incremental developments like the one proposed at 311 Appin Road can have cumulative impacts on koalas in the area. Even if koala habitat itself is not impacted, the associated impacts of increased development and human activity, including from increased traffic, dogs and other stressors in peri-urban areas can have impacts on koalas, and may not be being properly assessed or managed in the application process.

The proposed development at 311 Appin Rd, St Helen’s Park is still under assessment.

Case Study 4 – Implications of dual Koala SEPPS – Coffs Harbour LGA

While Coffs Harbour LGA is not in the SBB, the current concerns it has in relation to updating its KPOM demonstrate the absurdity of current policy settings in NSW.

The Coffs Harbour KPOM was finalised in 1999 under former Koala SEPP 44. The mapping that underpins the KPOM is out of date. For example, original mapping focused on south-east of the LGA, while mapping in the north and west of LGA was limited. A new KPOM would provide the opportunity to establish a more accurate and up-to-date map of koala habitat in the area. It would also provide the opportunity to review and update knowledge of road risks and strategies for managing impacts on koalas, addressing changes that have occurred over the last 20 years.

Currently both Koala SEPP 2020 and Koala SEPP 2021 apply in the Coffs Harbour LGA. The Department of Planning and Environment’s FAQs document indicates that “a KPOM must be made under one SEPP – either the 2020 SEPP or 2021 SEPP. If a council wishes to prepare a KPOM under the 2021 SEPP, at present it is not possible for the KPOM to apply to land that is covered by the 2020 SEPP (that is, RU1, RU2 or RU3 zoned land...)”.¹¹⁸

The Council has acknowledged that if it was to update its KPOM at this time, it would be affected by the distinction between Koala SEPP 2020 and Koala SEPP 2021 in its LGA.¹¹⁹ For example, a different scope of ‘core koala habitat’ would apply to rural zones and non-rural zones – a distinction that does not make sense ecologically. There is also a question over whether the updated mapping would have any application under the Private Native Forestry (PNF) Code of

¹¹⁸ Department of Planning, Infrastructure and Environment, *Koala SEPP 2021 - Frequently Asked Questions*, March 2021 <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/Frequently-Asked-Question-State-Environmental-Planning-Policy-Koala-Habitat-Protection-2021.pdf?la=en>>

¹¹⁹ Koala management advisory committee, Committee Meeting Minutes, 18 August 2022, <https://www.coffsharbour.nsw.gov.au/files/sharedassets/public/your-council/committees/minutes/draft-kmac-aug-2022-minutes.pdf>



Practice, or whether existing PNF core koala habitat would continue to apply despite an updated KPoM (see discussion on PNF in Part 8).

4.7 Biodiversity Certification

4.7.1 Overview

Biodiversity certification is a streamlined biodiversity assessment process for large areas of land proposed for development. It involves large-scale, upfront assessment of biodiversity values and impacts in a designated area. It is often used for strategic planning at a landscape scale (e.g. new suburb for greenfield development). Once land is certified, development may proceed without the usual requirement for site-by-site biodiversity assessment.

Biodiversity certification is provided for under Part 8 of the BC Act, which distinguishes between standard biodiversity certification and strategic biodiversity certification:

- **Biodiversity certification:** Biodiversity certification is available to landholders and planning authorities e.g. (local council, DPE). An application must be accompanied by a biodiversity certification assessment report and the BOS applies. The proponent may be required to retire biodiversity credits in accordance with the BOS.
- **Strategic biodiversity certification:** Strategic biodiversity certification is only available to planning authorities, who can seek to have an application for biodiversity certification declared strategic by the Environment Minister. When deciding whether to declare a biodiversity certification application strategic, the Minister must take into account criteria set out in clause 8.3 of the *Biodiversity Conservation Regulation 2017 (BC Regulation)*, including the size of the area of the land, any regional or district plan, advice of the Planning Minister, and the economic, social or environmental outcomes that the proposed biodiversity certification could facilitate. In the case of strategic biodiversity certification, the BOS does not apply.¹²⁰ While the proponent for strategic biodiversity certification may elect to retire biodiversity credits, additional conservation measures are also allowed as a way of offsetting impacts on biodiversity, including reservation of land under the *National Parks and Wildlife Act 1974 (NSW) (NPW Act)*; adoption of development controls or state infrastructure contributions under the EP&A Act that conserve or enhance the natural environment; or any other measure determined to be an approved conservation measure by the Environment Minister.¹²¹

Once land is conferred biodiversity certification, a person wishing to carry out development on that land under the EP&A Act is not required to assess the likely impacts of that development on biodiversity, and consent authorities are not required to consider the likely impacts of that development on biodiversity.¹²²

¹²⁰ BC Regulation, cl 6.2(5)(b).

¹²¹ BC Act, s8.3(2)(b).

¹²² BC Act, s 8.4; LLS Act, s 60H(3).



Biodiversity certified land is also categorised as category 1-exempt land under the LLS Act, meaning clearing on biodiversity certified land can be carried out without being an authorised activity, code-based clearing, or requiring approval from the NVP.

4.7.2 Key issues for koalas

Biodiversity certification may provide opportunities to implement specific protections for koalas at a landscape scale – see **Case Study 5 – Cumberland Plain Conservation Plan**.

However, there are ongoing concerns about the provisions of the BC Act, and the use of biodiversity certification more broadly. For example:

- **Overriding site specific assessment:** EDO supports effective, upfront strategic land use planning. This is an important planning tool that can help manage land use conflicts and identify high conservation areas for protection. However, it should not, as biodiversity certification does, comprehensively remove the need for individual site assessment at the development assessment phase. Doing so does not allow the impacts of individual projects to be assessed, once the details are better known or subsequently amended. Also, it does not allow more up-to-date information about biodiversity values and potential impacts of development to easily be taken into account down the track. For example, if a koala colony increased in population or migrated within the Cumberland Plain area (which has recently been conferred biodiversity certification), impacts of future individual development proposals on koalas may not need to take that into account. It is not clear to what extent provisions to modify or revoke biodiversity certification would be invoked to address future concerns.¹²³
- **Implement and enforcement of certification plans:** **Case Study 5** highlights a number of concerns regarding the implementation and enforcement of the Cumberland Plain Conservation Plan. Many of these concerns would relate to the implementation and enforcement of biodiversity certification more broadly, not just the Cumberland Plain Conservation Plan.
- **Ability to deliver biodiversity gains:** It is unclear whether biodiversity certification will deliver proposed biodiversity in the long-term. In the case of standard biodiversity certification, reliance on the BOS is problematic; as outlined in 3.2, EDO has ongoing concerns about the ability of the BOS to deliver effective biodiversity gains. In the case of strategic biodiversity certification, new provisions are untested and the significant discretion and lack of scientific rigour around ‘additional conservation measures’ is concerning.
- **Inadequate safeguards:** Safeguards, such as the serious and irreversible impacts (SII) mechanism (see 3.3), are not strictly applied (the Minister only has to consider SII, rather than refuse proposals that will have SII¹²⁴).

¹²³ BC Act, Part 8, Division 6.

¹²⁴ BC Act, s 8.8.



Case Study 5 – Cumberland Plain Conservation Plan

The Cumberland Plain Conservation Plan (**CPCP**) was prepared by the NSW Government to support the delivery of new housing, jobs, and infrastructure for the Western Parkland City until 2056. The geographic area covered by the plan (referred to in the CPCP as the “CPCP Area”) extends from north of Windsor to Picton in the south, and from the Hawkesbury-Nepean River in the west to the Georges River near Liverpool in the east, and comprises around 200,000 hectares of land. This includes parts of eight local government areas – Wollondilly, Camden, Campbelltown, Liverpool, Fairfield, Penrith, Blacktown and Hawkesbury.

The CPCP was the first proposal to seek strategic biodiversity certification under Part 8 of the BC Act and was approved by the NSW Environment and Heritage Minister on 17 August 2022.¹²⁵ It is still awaiting approval by the Commonwealth Minister for Environment under the EPBC Act.

The NSW approval ‘confers biodiversity certification’ on land known as ‘certified-urban capable land’.¹²⁶ This removes the need for landholders to obtain consent/approval for the clearing of native vegetation (at a state level) on ‘certified-urban capable land’ as long as they comply with the relevant planning controls in the new Chapter 13 ‘Strategic Conservation Planning’ of the Biodiversity and Conservation SEPP, which was introduced to support the CPCP. Moreover, a person wishing to carry out development under the EP&A Act on ‘certified-urban capable land’ is not required to assess the impacts of that development on biodiversity, and Chapters 3 and 4 of the Biodiversity and Conservation SEPP (Koala habitat protection 2020 and 2021) do not apply to ‘certified-urban capable land’. If approval is given by the Commonwealth Environment Minister (as noted above, an application has been lodged) assessment/approval under the EPBC Act for development on certified-urban capable land will also not be required.

There are other categories of land that have been identified under the CPCP, including “avoided land” and “strategic conservation land”, which have not been conferred biodiversity certification. This means landholders will be required to follow the usual assessment requirements under the EP&A Act (i.e., assess the likely impacts on biodiversity). Chapters 3 and 4 of the Biodiversity and Conservation SEPP also apply, as well as the new planning controls in Chapter 13. Landholders will be required to seek approval under the EPBC Act if they wish to carry out development that will, or is likely to, have a significant impact on a matter of national environmental significance (**MNES**).

In order to address the likely impacts of development on biodiversity values within the CPCP Area, the Minister has specified (in the Order conferring strategic biodiversity certification) a number of “approved conservation measures”, “other approved measures” and “measures to minimise likely serious and irreversible impacts on biodiversity values”, including the following that specifically relate to Koalas:

¹²⁵ See https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2022_2022-380.pdf

¹²⁶ This covers approximately 11,165 hectares and comprises the land depicted as ‘certified-urban capable land’ on the maps in Schedule 2 to the order in the NSW Government Gazette.



- Prioritise the avoidance of impacts from essential infrastructure on avoided land to protected koala habitat within the Wilton and Greater Macarthur growth areas to maintain the function of koala movement corridors.¹²⁷
- Mitigate indirect and prescribed impacts from urban, industrial, infrastructure development on the Southern Sydney koala population to best practice standards and in line with advice from the Office of the NSW Chief Scientist & Engineer and in accordance with Appendix E of the CPCP.¹²⁸
- Protect threatened species likely to be at risk of residual adverse impacts from development under the CPCP in accordance with the CPCP conservation land selection steps. This includes securing 705 ha of important habitat for *Phascolarctos cinerus* (koala).¹²⁹
- Establish a reserve to protect the north-south koala movement corridor along the Georges River between Appin and Long Point.
- Protect koala corridors in the Cumberland subregion, including those along the Nepean River, Georges River, Cataract River and Ousedale Creek.
- Provide opportunities for the residents of Western Sydney to learn about and actively participate in biodiversity conservation including koala conservation.
- Support rehabilitation measures to help maintain koala health and welfare.

Other measures are also set out in the CPCP itself, including:

- Mitigation measures to address residual risks to threatened fauna, which include specific mitigation measures for koalas.¹³⁰ This includes, for example:
 - Designing subdivision layout including perimeter roads and asset protection zones to reduce impacts on and protect areas of koala habitat;
 - Dog-proof fences to provide protections for koalas; and
 - Undertaking preconstruction koala surveys.
- Restrictions on rezoning for future urban development – such rezoning will only be allowed within the identified certified-urban capable land, and a ministerial direction will restrict the intensification of this development type on avoided land within nominated areas.¹³¹

The order in the Gazette states that the Applicant *will* deliver the above Commitments, and that the approved conservation measures (i.e., the above measures) are to be delivered in accordance with the order and the CPCP. The CPCP is enforceable by the Minister under the order and the order prevails to the extent of any inconsistency between the order and the CPCP.

¹²⁷ As per the CPCP, ‘protected koala habitat’ is defined as ‘koala habitat that has been included in the [CPCP]’s Strategic Conservation Area and/or the avoided land. It includes some areas of cleared land that may be restored to enhance koala corridors and habitat’.

¹²⁸ Entitled ‘species and TEC-specific mitigation measures’.

¹²⁹ Important koala habitat is defined as the ‘term used to describe primary, secondary and tertiary corridors, as defined in the Cumberland Plain Assessment Report.’ According to the CPCP, it is the area that is critical to the long-term viability of koalas (primary corridors) as well as the areas (if enhanced) that would support the population (second and tertiary corridors).

¹³⁰ See *Cumberland Plain Conservation Plan, Appendix E* < <https://pp.planningportal.nsw.gov.au/final-cumberland-plain-conservation-plan>>

¹³¹ *Cumberland Plain Conservation Plan*, p 24 < <https://pp.planningportal.nsw.gov.au/final-cumberland-plain-conservation-plan>>



The order also requires the Applicant to:

- establish the Koala Working Group;
- enter into arrangements providing for the transfer of land (over a twenty year period) for reservation under the NPW Act as the Georges River Koala Reserve;
- implement the recommendations in the report '*Advice regarding the protection of koala populations associated with the Cumberland Plain Conservation Plan*' identified by the Executive Implementation Committee as being relevant to the CPCP;
- report on progress; and
- take certain adaptive management steps if certain targets are not being met.

There are a number of other measures specified in the order which do not specifically relate to koalas, but would likely be relevant nevertheless (for example, 'avoid and minimise impacts of up to 4,510 ha of high biodiversity value area through strategic conservation planning in the nominated areas).

Additional measures to protect koalas, which the CPCP commits to taking, are set out in the CPCP's 'Sub-Plan A: Conservation Program and Implementation' and 'Sub-Plan B: Koalas'.

While the CPCP sets out many positive commitments to protect koalas and their habitat, and therefore provides an opportunity to implement important and specific protections for koalas, there are concerns about the delivery of these commitments. For example, the CPCP notes that some of the offset targets might be difficult to meet and that while early work to acquire the necessary land for the new reserves/national parks is under way, the process of acquiring all of the necessary land and protecting it could take up to 20 years to complete. Funding is and will be a key challenge too.

There are also concerns about compliance with and enforcement of the CPCP, including because:

- multiple agencies and levels of government are responsible for delivering actions;
- uncertain language is adopted in commitments and measures, which will make compliance difficult to measure, and enforcement action difficult to take;
- some measures lack specificity, which will make it difficult to determine whether an action has been adequately completed;
- the Environment Minister has broad discretion to determine 'equivalent conservation measures' as alternatives to the conservation actions identified in the biodiversity certification agreement, and to modify biodiversity certification to give effect to those equivalent measures without the need for further biodiversity assessment or public consultation;
- the applicant (DPE and the regulator (the Environment Minister) are essentially the same (the NSW Government); and
- civil enforcement requires the consent of the Minister (meaning there is no "open standing" to remedy or restrain a breach of the CPCP).



4.8. Strategic land use planning

4.8.1 Overview

Strategic land use planning (**strategic planning**) is a way to identify, assess, manage, and plan for the future use of land. It can avoid future land use conflict and challenges of protecting of koala habitat on a case-by-case basis, including the cumulative impacts of individual development applications.

Part 3, Division 3.1 of the EP&A Act outlines requirements for strategic land use planning, including in relation to:

- regional strategic plans;
- district strategic plans;
- local strategic planning statements.

Strategic plans are generally implemented through LEPs. For example, district plans must give effect to regional plans, and district plans are implemented through a council's LEP – see section 3.8 of the EP&A Act. Local strategic planning statements are also implemented through LEPs – see section 3.33(2) of the EP&A Act.

Further, in the case of:

- Part 4 development – in general, relevant strategic plans are considered by proponents when preparing an environmental impact statement (EIS) (e.g. this may be required by SEARs).
- Part 5 activities - relevant strategic plans must be taken into account by approval authorities when undertaking a review of environmental factors (cl 171(2)(q), EP&A Regulation)

Additionally, there are many non-statutory strategic planning policies that also guide planning and development decisions, including for example in relation to transport (e.g. *Future Transport Strategy 2056*¹³²) and urban design (e.g. *Urban Design for Regional NSW – A guide for creating healthy built environments in regional NSW*)¹³³ and biodiversity (many councils have developed biodiversity strategies that guide land use and planning in their area – e.g. *Illawarra Biodiversity Strategy* developed jointly by Wollongong, Shellharbour and Kiama councils)¹³⁴.

4.8.2 Key issues for koalas

Strategic planning provides an opportunity to identify koala habitat and koala habitat corridors upfront, and plan for their future protection.

While strategic plans can, and do, recognise the need to identify and protect koala habitat and wildlife corridors, there is no explicit requirement in the EP&A Act that they do so. Generally,

¹³² https://www.future.transport.nsw.gov.au/sites/default/files/2022-09/Future_Transport_Strategy_lowres_2.pdf

¹³³ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/urban-design-guide-for-regional-nsw-2020-06-03.pdf>

¹³⁴ Part 1: https://wollongong.nsw.gov.au/_data/assets/pdf_file/0025/9970/Illawarra-Biodiversity-Strategy-Volume-1.pdf, Part 2: https://wollongong.nsw.gov.au/_data/assets/pdf_file/0026/9971/Illawarra-Biodiversity-Strategy-Volume-2.pdf



strategic plans must include “the basis for strategic planning in the region, having regard to economic, social and environmental matters” (sections 3.3, 3.4 and 3.9 EP&A Act).

The strategic plan itself does not provide the legal protection for koala habitat. The vision of the strategic plan must be delivered through other tools. Given that koala habitat and wildlife corridors can cover large areas of land across various tenures, multiple mechanisms may be needed. These could include land use zoning or planning controls in council’s LEPs (see 4.4.2), KPoMs developed under the Koala SEPPs (see 4.6), national park reservations or private land conservation agreements.

Therefore, the protection of koala habitat and corridors will only be as good as the legal tools available to implement the strategic plan – for example, planning controls may be put in place for areas identified as high environmental value koala habitat, however if a decision maker retains discretion to be able to approve development, koala habitat and corridors may remain at risk. Similarly, if identified actions include reservation of land or development of updated KPoMs, the ability to undertake these actions may be limited by funding and capacity. It is unclear what remedies, if any, are available if strategic plans are not effectively implemented. Strategic planning for koala corridors is discussed further in **Box 4 – Protection of koala corridors**.

Case Study 6 – Strategic planning for koala protection on the NSW north coast provides examples of how strategic planning and legal tools are being used to protect koalas on the NSW North Coast.

Case Study 6 – Strategic planning for koala protection on the NSW north coast

This case study provides several examples of how strategic planning and legal tools are being used to protect koalas on the NSW North Coast. It is not intended to be an exhaustive analysis of all plans, rules and initiatives in the region.

Regional strategic plan

The *North Coast Regional Plan 2041*¹³⁵ was finalised by the NSW Government in December 2022. The Plan contains a number of key provisions relating to koalas and koala habitat, namely:

- The Plan recognises the role of the *NSW Koala Strategy* (p15) and acknowledges that the region contains five of the ten koala stronghold areas as identified in the *NSW Koala Strategy* (p21).
- One of the strategies identified for protecting High Environmental Value Assets includes “developing or updating koala habitat maps to strategically conserve koala habitat to help protect, maintain and enhance koala habitat” (p23). However, it is unclear how mapping koala habitat will improve protection unless additional action is taken and appropriate mechanisms are in place to protect those mapped areas.

¹³⁵ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Plans-and-policies/Plans-for-your-area/Regional-plans/North-Coast-Regional-Plan-2041.pdf?la=en>



- Similarly, one of the actions for the NSW Government under the Plan is to work with and assist councils to “ensure koala habitat values are included in land-use planning decisions through regional plans, local strategic planning statements and local environmental plans”. Again, it is unclear what that might look like in practice.
- The Plan identifies the opportunity to establish Guulabaa - Place of Koala, a nature based tourism precinct in Cowarra State Forest (p76). There is no further detail about this initiative in the Plan.
- The Plan also discusses the implementation of Regional City Action Plans (**RCAPs**) for Port Macquarie, Coffs Harbour, Lismore and Tweed Heads, including several key areas for future collaboration including on-ground verification of Koala corridors to support Port Macquarie-Hastings Council’s Koala Recovery Strategy (p67) and future work across government to protect and enhance vegetation to strengthen corridors that support koalas and other wildlife and collaboration in Lismore (p71).

District plans

It is our understanding that there are currently no district plans in place in the north coast region.

Local strategic planning statements

Local strategic planning statements (**LSPS**) can indicate what action can be undertaken at a local level to implement regional plans and address other strategic planning issues, including in relation to koala protection. For example:

- A key action identified in the Coffs Harbour LSPS¹³⁶ is to complete the review and update of the Coffs Harbour City Koala Plan of Management (p33). This is the key mechanism for identifying and protecting koala habitat and corridors in the Coffs Harbour LGA.
- Key actions identified in the Port Macquarie LSPS¹³⁷ include:
 - develop, implement, monitor and enforce Koala Plans of Management, and relevant controls in the LEP and DCP to secure the future of koalas in the LGA (p46).
 - implement the Koala Recovery Strategy to secure the future of koalas in the LGA (p46).
- Key actions identified in the Lismore LSPS¹³⁸ include:
 - In the update of the Growth Management Strategy, review areas nominated for potential future development to exclude land with high conservation value, including prime koala habitat, or ensure these values can be protected in any future rezoning and development (p47).
 - obtain funding and prepare an LGA wide Koala Plan of Management (a KPOM is currently in place for south-east Lismore) (p47).

¹³⁶ <https://www.coffsharbour.nsw.gov.au/files/sharedassets/public/building-and-planning/growth-strategies/local-strategic-planning-statement-2020/coffs-harbour-lsps-2020-final.pdf>

¹³⁷ <https://www.pmhc.nsw.gov.au/files/assets/public/document-files/your-council/publications/strategies/shaping-our-future-2040-local-strategic-planning-statement.pdf>

¹³⁸ https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Local+Strategic+Planning+Statements/LSPS+regional+2020/Lismore+Local+Strategic+Planning+Statement+2040.pdf



- prepare and implement biodiversity and tree preservation development controls and guidelines that ensure biodiversity and ecological connectivity is adequately assessed and impacts avoided and/or mitigated, including the impact of removal of koala habitat trees in the Lismore urban area (p47).
- create and implement a strategic offset policy and procedures for Council to consolidate koala habitat on Council owned land (p47).

Box 4 - Protection of koala corridors

The importance of landscape scale connectivity of koala habitat, via koala habitat corridors, is well-recognised.

Identifying and protecting koala habitat corridors may require a different approach to protecting koala habitat. For example, there is no legal definition of koala habitat corridor, and it should not be assumed that areas required as koala habitat corridors align with core koala habitat. Additionally, a one-size-fits-all approach may not be appropriate. For example, Biolink explains that “*koala habitat corridors are accepted as being of a size sufficient to support koala residency and therefore koala home ranges (DPIE 2019, Biolink 2020). The spatial delineation of koala habitat corridors consequently requires consideration and application of knowledge regarding koala home range size, specific to the local area*”.¹³⁹

The appropriate size for a habitat corridor depends on the carrying capacity of the vegetation, which for the SBB is typically low. In the context of the Campbelltown koala population, given local knowledge of koala densities in these landscapes a minimum average corridor width of ~400 m and an absolute minimum width of 250 m is recommended.¹⁴⁰

Effective strategic land use planning should identify both koala habitat and koala habitat corridors needed to support koala residency in local and regional areas. Options for protecting koala habitat corridors should be considered at the landscape scale rather than the individual site scale, and may include both public land reservation and private land conservation.

Interestingly, the *NSW Koala Strategy* makes no specific mention of koala habitat corridors distinct from the conservation of koala habitat. Despite this, the NSW government has taken steps to protect koala habitat corridors in some areas. For example, the protection of koala habitat corridors was considered as part of the development of the Cumberland Plain Conservation Plan and some areas of land have been earmarked for protection – see **Case Study 5**.

Local councils can play a role in identifying koala habitat corridors, including through biodiversity strategies and KPoMs, and take action to protect those areas – including through

¹³⁹Biolink, *Sydney Basin Bioregion: Koala habitat and population assessment*, 2023, Report for Total Environment Centre by Biolink Ecological Consultants, Pottsville, NSW.

¹⁴⁰ See Biolink. (2020). *Gilead Stage 2: Commentary on the koala carrying capacity and corridor review reports prepared by Eco Logical Australia on behalf of Lend Lease Communities, Fig Tree Hill) Pty. Ltd.* Report to Campbelltown City Council. Biolink Ecological Consultants, Uki, NSW; See also NSW Chief Scientist and Engineer, *Response to questions about advice provided in the Koala Independent Expert Panel Report 'Advice on the protection of the Campbelltown Koala population'*, February 2021 <https://www.chiefscientist.nsw.gov.au/data/assets/pdf_file/0005/485924/OCSE-Response-to-questions_Campbelltown-Koalas-Feb-2021.pdf>



additional planning controls or appropriate land use zoning. For example, the Coffs Harbour KPoM includes a habitat links map, and sets out additional matters for consideration in determining applications in these areas.¹⁴¹

Separate to government, a number of non-government led initiatives are taking action to protect koala corridors, for example:

- Great Eastern Ranges and WWF-Australia have partnered to restore and reconnect habitat for koalas in six priority locations across eastern Australia following the devastating bushfires of 2019-2020 through the ‘Cores, Corridors and Koalas’ project.¹⁴²
- Greening Australia, WWF-Australia and Campbelltown Council are collaborating to protect and restore Koala habitat and corridors across south-west Sydney.¹⁴³

5. Part 5 Infrastructure

5.1 Overview

Certain projects undertaken by councils, government departments or State agencies do not require development consent. In general, the types of activities that do not require development consent are set out in *State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP)* (or any other EPI), and include air transport facilities, correctional facilities, educational establishments, electricity transmission and distribution networks, gas pipelines, and telecommunications facilities.

The environmental impacts of these activities may still need to be assessed. Part 5 of the EP&A Act provides a separate environmental assessment procedure that applies to activities that are not assessed as part of the Part 4 development consent process.

The following assessment and determination pathways apply under Part 5:

- **Division 5.1 activities:** Division 5.1 of the EP&A Act applies to relevant infrastructure projects that are not SSI or Critical Infrastructure). Section 5.5 requires a determining authority to examine and take into account all matters affecting or likely to affect the environment by reason of that activity. An initial first step is a review of environmental factors (**REF**).¹⁴⁴ If the

¹⁴¹ See section 3.6 of the Coffs Harbour KPoM, which provides that: “the consent authority shall not grant consent to development in areas which function as koala habitat link areas, including those shown on the Habitat Links Map of this KPoM, unless it is satisfied that: • the proposal will not reduce the effectiveness of the area in acting as a koala habitat link between areas of secondary and/or primary koala habitats; • the significance of the area in contributing to the functioning of amelioration measures constructed and/or proposed by the RTA or Council for roadways has been considered; and, • enhancement planting of preferred koala trees has been included in the proposal”

¹⁴² See <https://ger.org.au/project/cores-corridors-and-koalas/>

¹⁴³ <https://www.greeningaustralia.org.au/projects/koalacorridorssydney/>

¹⁴⁴ See Department of Planning and Environment, *Guidelines for Division 5.1 assessments*, June 2022, available at <https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/Policy-and-legislation/SSI-Guidelines/Guidelines-for-Division-51-assessments.pdf?la=en>



activity is likely to significantly affect threatened species or ecological communities, or their habitats then either an SIS or BDAR is required under the BC Act,¹⁴⁵ and if the proposed activity is likely to have a significant impact on the environment more broadly, an EIS must be prepared.¹⁴⁶ The BOS threshold does not apply to development that is an activity subject to environmental impact assessment under Part 5,¹⁴⁷ but the BOS will apply if the proponent elects to prepare a BDAR.

- **State Significant Infrastructure:** SSI is identified in Schedules 3 and 4 of the *State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP)*. An EIS must be prepared in accordance with Secretary's Environmental Assessment Requirements (**SEARs**). The SEARs must require an EIS to be prepared.¹⁴⁸ The BOS applies unless the Secretary or Environment Agency Head determine that the project is not likely to have a significant impact on biodiversity values.¹⁴⁹ Any application for SSI must be accompanied by a BDAR unless the Planning Agency Head and the Environment Agency Head determine that the proposed development is not likely to have any significant impact on biodiversity values.¹⁵⁰ If an application for SSI will have SII, the consent authority must take those impacts into consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted,¹⁵¹ but is not required to refuse the proposal.
- **Critical Infrastructure:** Any SSI application can also be declared to be Critical State significant infrastructure (**CSSI**) if the Planning Minister believes the infrastructure is essential for the State for economic, environmental or social reasons.¹⁵² DPE has prepared standard SEARs for critical State significant infrastructure projects.¹⁵³ These are out-of-date and refer to previous biodiversity and offsetting policies. There are no specific requirements in relation to koalas, but the SEARs can require an assessment of specific species.

5.2 Key Issues for Koalas

The mechanisms used to manage the impacts of infrastructure are the same as Part 4 development (see Part 4). However, we note there is significant discretion within the provisions of Part 5, meaning that safeguards may fall short of protecting koalas as might otherwise be the case if those mechanisms were to be applied objectively and absolutely.

¹⁴⁵ BC Act, s 7.8.

¹⁴⁶ EP&A Act, s 5.7.

¹⁴⁷ BC Act, s 7.2(2).

¹⁴⁸ EP&A Act, s 5.16(2).

¹⁴⁹ BC Act, s 7.9.

¹⁵⁰ BC Act, s 7.9.

¹⁵¹ BC Act, s 7.16(3) and (4).

¹⁵² EP&A Act, s 5.13.

¹⁵³ See <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/critical-state-significant-infrastructure-standard-secretarys-environmental-assessment-requirements-SEARs-2015-12.pdf?la=en>



6. Clearing of vegetation on rural land

6.1 Overview

Part 5A of the LLS Act regulates clearing on rural land, which includes some land in the SBB. Rural land includes any part of the state except urban and other areas of the State to which *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* applies (**Vegetation in Non-Rural Areas SEPP**), national park estate and other conservation areas and state forestry land.¹⁵⁴ Land that falls outside the scope of the LLS is identified as excluded land. Clearing generally includes removing or destroying native vegetation, but the framework does not cover clearing of vegetation undertaken as part of an activity that requires consent or approval under the EP&A Act.¹⁵⁵

For the purpose of Part 5A of the LLS Act, rural land is categorised as either:

- Category 1 – exempt land; or
- Category 2 – regulated land, including the following sub-categories:
 - Category 2 – vulnerable regulated
 - Category 2 – sensitive regulated.

Clearing undertaken on category 1 exempt land is not regulated (i.e. it can be carried out with being an authorised activity, code-based clearing or requiring approval from the NCVF).

Clearing on category 2 – regulated land can be carried out under various approval pathways depending on the scale of clearing:

- **Allowable activities:** Certain low-impact activities are described as allowable activities and can be carried out without approval or other authorisation. Allowable activities are listed in Schedule 5A of the LLS Act.
- **Code-based clearing:** A substantial range of activities can be carried out (with notification or certification – but not robust environmental assessment and approval) if they comply with the *Land Management (Native Vegetation) Code (Native Vegetation Code)*. Substantial concerns have been raised regarding the scope of that Code.¹⁵⁶
- **High impact clearing:** Higher impact clearing requires approval from the NVP. This clearing triggers biodiversity assessment requirements under the BC Act.

¹⁵⁴ LLS Act, s60A.

¹⁵⁵ LLS Act, s60O and s60P.

¹⁵⁶ See, for example:

- Audit Office of NSW, *Managing Native Vegetation*, June 2019 <https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>
- Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, <https://www.nrc.nsw.gov.au/land-mngt>
- Environmental Defenders Office, *Restoring the balance in NSW native vegetation law Solutions for healthy, resilient and productive landscapes*, August 2020, <https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf>



Additional restrictions apply to land categorised as category 2 – vulnerable regulated or category 2– sensitive regulated. For example:

- There are different allowable activity rules for category 2 – vulnerable regulated or category 2– sensitive regulated.
- Code-based clearing cannot be undertaken on category 2– sensitive regulated.¹⁵⁷

Further information is available in EDO’s Fact Sheet: [Clearing Vegetation on Rural Land](#).¹⁵⁸

6.2 Key issues for koalas

It would be reasonable to expect that clearing that would have an impact on koala habitat would be treated as high impact clearing, requiring robust environmental assessment and determination by the NVP. However, in practice, the framework does not work in this way. In fact, the former Office of Environment and Heritage warned that the Native Vegetation Code would expose 99% of koala habitat on private land to clearing.¹⁵⁹ This is because:

- The framework allows for the clearing of native vegetation associated with land management activities, such as the construction of rural infrastructure including fences, dams, sheds and tracks. These are known as allowable activities. While EDO does not oppose exemptions for activities that are genuinely minimal-impact routine activities necessary for productive farms, EDO has previously raised concerns about the breadth of allowable activities and whether this category of activities is realistically limited to genuinely low impact activities.¹⁶⁰ While there are some restrictions on allowable activities in category 2-sensitive land, it does not prohibit allowable activities in category 2-sensitive land outright. The scope of category 2-sensitive land is also problematic as it relies on ‘core koala habitat’ (see Box 3). This means any limitations on allowable activities that apply to category 2-sensitive land would only apply to core koala habitat identified in a KPOM.
- The same problem arises in the case of code-based clearing. While code-based clearing cannot be undertaken on category 2-sensitive regulated land (including core koala habitat),¹⁶¹ reliance on the concept of core koala habitat means that the scope of koala habitat captured by category 2-sensitive regulated land is limited.

These policy settings mean that there are very limited circumstances in which the clearing of koala habitat is likely to be assessed under the high impact clearing pathway. Indeed, data indicates that between 2018 and 2020, a total of 84,500 ha of woody vegetation was cleared on rural regulated

¹⁵⁷ *Local Land Services Regulation 2014*, clause 124(1)(a)

¹⁵⁸ Available at <https://www.edo.org.au/wp-content/uploads/2022/02/171219-Clearing-Vegetation-on-Rural-Land.pdf>

¹⁵⁹ As revealed by a document released under Freedom of Information laws, prior to the Code coming into effect the OEH had warned the NSW Government that 99% of koala habitat in rural areas would be exposed to Code-based clearing. See <https://www.nature.org.au/media/287234/gipa945-ir-document-3.pdf>

¹⁶⁰ EDO, *Submission on the draft Local Land Services Amendment Bill 2016*, June 2016 < https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf >

¹⁶¹ *Local Land Services Regulation 2014*, clause 124(1)(a)



land,¹⁶² and there has been only one application assessed by the NVP under the high impact clearing pathway (and it only considered 0.32 ha of clearing).¹⁶³

For clearing that does require approval by the NVP, a BDAR is required and the BOS applies. See our comments in Part 2 regarding concerns with the BOS. The NVP must refuse any clearing that has a serious and irreversible impact on biodiversity.¹⁶⁴

Broader concerns about the framework for regulating land clearing under Part 5A of the LLS Act are set out in independent analysis by the Audit Office of NSW, NSW Natural Resources Commission and a NSW Parliamentary Inquiry into koala populations and habitat, as well as several EDO publications.¹⁶⁵ For example:

- The Audit Office of NSW found that the clearing of native vegetation on rural land is not effectively regulated and managed, responses to incidents of unlawful clearing are slow, with few tangible outcomes, and enforcement action is rarely taken against landholders who unlawfully clear native vegetation.¹⁶⁶
- The NSW Natural Resources Commission found that the roles and responsibilities for monitoring and enforcing the Native Vegetation Code need to be reviewed and monitoring of compliance with clearing approvals needs to be strengthened, including increasing transparency.¹⁶⁷

¹⁶² NSW Department of Planning and Environment, *Woody and non woody landcover change on rural regulated land Summary report 2020*, June 2022, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/woody-non-woody-landcover-change-rural-regulated-land-summary-rpt-2020-220261.pdf>

¹⁶³ Local Land Services, *Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013, Discussion Paper*, November 2022, available at <https://www.haveyoursay.nsw.gov.au/81791/widgets/390214/documents/246625>

¹⁶⁴ LLS Act, s 60ZF.

¹⁶⁵ See:

- Audit Office of NSW, *Managing Native Vegetation*, June 2019 <<https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>>
- Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, <<https://www.nrc.nsw.gov.au/land-mngt>>
- Environmental Defenders Office, *Restoring the balance in NSW native vegetation law Solutions for healthy, resilient and productive landscapes*, August 2020, <<https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf>>
- Environmental Defenders Office, *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013*, December 2022, <<https://www.edo.org.au/publication/edo-submission-to-the-statutory-review-of-the-native-title-vegetation-provisions-part-5a-and-schedule-5a-and-schedule-5b-of-the-local-land-services-act-2013/>>

¹⁶⁶ Audit Office of NSW, *Managing Native Vegetation*, June 2019, p2, <<https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>>

¹⁶⁷ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, p 14, <<https://www.nrc.nsw.gov.au/land-mngt>>



7. Clearing of vegetation in non-rural areas

7.1 Overview

Clearing on non-rural land is regulated under Chapter 2 (Vegetation in non-rural areas) of the Biodiversity and Conservation SEPP. As noted above (at 6.1), this framework regulates clearing that is not ancillary to development. Any clearing that is ancillary to the carrying out of other development requires development consent under the EP&A Act.

The framework establishes the following pathways:

- **Clearing that does not require a permit:** In accordance with cl 2.7 of the Biodiversity and Conservation SEPP, a permit or approval is not required for the removal of vegetation that the relevant council is satisfied is a risk to human life or property, or clearing for a traditional Aboriginal cultural activity (other than a commercial cultural activity). Additionally, a permit is not required for the removal of vegetation that the council or NVP is satisfied is dying or dead, and is not required as the habitat of native animals.
- **Allowable activities:** Similar to allowable activities under Part 5A of LLS Act, Part 2.5 of the Biodiversity and Conservation SEPP provides for allowable activities to be undertaken without a permit within certain zones (C2, C3, C4 or R5), if the land is identified on the *Allowable Clearing Map* and the land is used for primary production.¹⁶⁸ A list of allowable activities is set out in Part 2.5 of the Biodiversity and Conservation SEPP. Generally, the types of activities are similar to those in category 2-vulnerable and category 2-sensitive land under Schedule 5A, Part 4 of the LLS Act.
- **Clearing that requires a council permit:** Unless otherwise provided for, a council permit is required to clear vegetation in any non-rural area of the State that is declared by a DCP to be vegetation to which Part 2.3 of the Biodiversity and Conservation SEPP applies. That is, a council DCP will identify the vegetation that requires a council permit to be cleared.
- **Clearing that requires approval from the Native Vegetation Panel:** If proposed clearing would exceed the BOS threshold, then clearing would require approval by the NVP under Part 2.4 of the Biodiversity and Conservation SEPP.

7.2 Key issues for koalas

It appears that the NVP has not assessed any applications under Chapter 2 of the Biodiversity and Conservation SEPP. This suggests that most vegetation clearing in non-rural areas (not associated with development) is not triggering the BOS threshold. Other than that, there is very limited information about clearing undertaken under this framework specifically and how it may be impacting on koalas. It is unclear to what extent Chapter 2 of the Biodiversity and Conservation SEPP may be reviewed as part of the 5-year statutory review of the BC Act. The predecessor to Chapter 2 (the former *State Environmental Planning Policy (Vegetation in Non-Rural Areas)* 2017 was

¹⁶⁸ 'Land used for primary production' has the same meaning as section 10AA of the *Land Tax Management Act 1956*



introduced as part of the Land Management and Biodiversity Conservation Reforms, but sits under the EP&A Act rather than the BC Act or LLS Act.

Concerningly, the Government has indicated its intention to expand the scope of allowable activities to include sustainable grazing, clearing to remove imminent risk to life or property, removing invasive native species, and native vegetation thinning. Some of these activities cannot be said to have genuinely low impacts. Under the LLS Act, many of these are regulated via the Land Management Code on rural land, not as allowable activities. It would be inappropriate to allow these as allowable activities on non-rural land.

8. Forestry - Private Land

8.1 Overview

Forestry on private land is regulated under Part 5B of the LLS Act. For the purpose of private native forestry (**PNF**), there are several pathways that may be relevant when considering impacts on koalas. These are summarised as follows:

- **Excluded land:** These are areas of the State to which Part 5B of the LLS Act (Private Native Forestry) does not apply.¹⁶⁹ Koala habitat is, generally, not excluded land, but some koala habitat may fall within excluded areas.
- **PNF Core Koala Habitat areas:** PNF cannot occur in areas identified in *PNF Core Koala Habitat maps* in relevant Private Native Forestry Codes of Practice.
- **PNF Koala Prescription Map:** Areas of ‘high koala habitat suitability’ are mapped on a PNF Koala Prescription Map in relevant PNF Codes. PNF operations carried out in areas identified on a PNF Koala Prescription Map are required to comply with specific Species Ecological Prescriptions.

¹⁶⁹ Section 60ZS of the LLS Act provide that Part 5B applies to any area of the State, other than the following—

- a) a State forest or other Crown-timber land within the meaning of the *Forestry Act 2012*,
- b) a plantation within the meaning of the *Plantations and Reafforestation Act 1999*,
- c) national park estate and other conservation areas referred to in section 60A (b),
- d) land that is declared as a marine park or an aquatic reserve under the *Marine Estate Management Act 2014*,
- e) land that is subject to a private land conservation agreement under the *Biodiversity Conservation Act 2016*,
- f) land that is subject to be set aside under a requirement made in accordance with a land management (native vegetation) code under Part 5A,
- g) land that is or was subject to a requirement to take remedial action to restore or protect the biodiversity values of the land under Part 5A or under the *Biodiversity Conservation Act 2016*, the *Native Vegetation Act 2003* or the *National Parks and Wildlife Act 1974*,
- h) land that is subject to an approved conservation measure that was the basis for other land being biodiversity certified under Part 8 of the *Biodiversity Conservation Act 2016* or under any Act repealed by that Act,
- i) land that is an offset under a property vegetation plan made under the *Native Vegetation Act 2003* that remains in force or is a set aside area under a Ministerial order under Division 3 of Part 6 of the *Native Vegetation Regulation 2013* that remains in force,
- j) any area in which forestry operations cannot be carried out because of the requirements of any other Act or statutory instrument or any agreement or court order.



- **Other areas:** In other areas, PNF can be undertaken generally in accordance with relevant PNF Codes. Most koala habitat should be captured by either a *PNF Core Koala Habitat* or *PNF Koala Prescription Map*, so it is unlikely that any koala habitat will fall into this category (although this is not certain).
- **Prohibitions in certain zones:** It is noted that some LEPs may prohibit PNF in certain zones.

8.2 Key issues for koalas:

An outcome of the political koala wars (see Box 1) has been the ‘decoupling’ of the Koala SEPP and rules regulating PNF. Under former PNF Codes, PNF was prohibited from occurring in areas of core koala habitat within the meaning of the Koala SEPP. It had been proposed to remove this exclusion entirely, and instead introduce prescriptions that would apply to highly suitable koala habitat and any area with a koala record. However, following advice from the NSW Chief Scientist and Engineer, raising concerns that this was a worsening of protections,¹⁷⁰ exemptions have been retained. This has been implemented through new ‘PNF Core Koala Habitat’ maps rather than relying on KPoM mapping.¹⁷¹ We understand the PNF Core Koala Habitat maps reflect the KPoM maps of core koala habitat in place as at April 2022. While this retains prohibitions that had been in place under former PNF Codes, it prevents prohibitions from extending to new core koala habitat that is mapped in new or updated KPoMs.

Under new PNF Codes, additional PNF Koala Prescription Maps have been developed. These maps are intended to identify areas of ‘high koala habitat suitability’ for the purpose of imposing additional prescriptions (rules) that apply to PNF undertaken in areas identified on a PNF Koala Prescription Map. The PNF Koala Prescription Map and concept of ‘high koala habitat suitability’ is unique to the PNF framework. Part 5B of the LLS Act (which governs PNF) does not specifically define or require the identification of areas of ‘high koala habitat suitability’. The concept of high koala habitat suitability is introduced in the PNF Codes but is not explicitly defined. An explanation of how areas of ‘high koala habitat suitability’ have been identified for the purpose of the PNF Koala Prescription Map is set out in the NSW Natural Resources Commission’s (NRC) *Final report - Advice on finalising Draft Private Native Forestry Codes of Practice*.¹⁷²

Given that only a limited amount of core koala habitat had been identified and mapped, this has meant that the prohibition of PNF in core koala habitat has limited application. The decision to retain this prohibition has meant that there has been no backwards step with regards to prohibitions, but the decision to ‘grandfather’ restrictions on PNF core koala habitat to only those areas identified in April 2022, limits the ability to protect core koala habitat in the future. However, the decision to introduce *PNF Koala Prescription Maps* means that areas of koala habitat that was

¹⁷⁰ NSW Chief Scientist and Engineer, *Advice on Koala protection in the proposed new Private Native Forestry Codes of Practice*, 2021, cited in Natural Resources Commission, *Final report Advice on finalising Draft Private Native Forestry Codes of Practice*, March 2022 <<https://www.nrc.nsw.gov.au/completed/pnf>>

¹⁷¹ See, for example, clause 8.5 of the PNF Code for Northern NSW.

¹⁷² Natural Resources Commission, *Final report Advice on finalising Draft Private Native Forestry Codes of Practice*, March 2022, available at <https://www.nrc.nsw.gov.au/pnf/koala>



not previously identified is now subject to greater protection through specific ecological prescriptions.

9. Forestry - Public land

9.1 Overview

Forestry operations undertaken on public (Crown) land (e.g. State forests) are primarily regulated under the *Forestry Act 2012* (NSW) (**Forestry Act**) and Integrated Forest Operations Approvals (IFOAs).

9.2 Key issues for koalas

There are no outright restrictions on carrying out forestry operations in koala habitat in State forests.

Instead, specific prescriptions apply, aimed at providing protections for koalas, as follows:

- Under the current Coastal IFOA, prescriptions for koalas are triggered in areas identified as either ‘Koala browse prescription 1’ or ‘Koala browse prescription 2’ in the Koala Browse Tree Prescriptions spatial data set.¹⁷³
- In other regions regulated by IFOAs (Brigalow Nandewar, South-Western Cypress, Riverina Red Gum), koala prescriptions apply generally and are, in general, triggered by looking for koalas prior to undertaking logging operations.¹⁷⁴

Koala prescriptions do not apply to logging operations carried out in other areas.

While IFOAs contain specific provisions and conditions relating to koalas and koala habitat, there are concerns that these do not provide specific enough protection for koalas. For example, with regards to the Coastal IFOA, EDO has previously raised concerns regarding inadequate tree retention rates and thresholds in harvesting areas including for hollow-bearing trees and recruitment trees, koala browse trees, and giant trees. Prior to the 2019-20 bushfires, we specifically recommended that North Coast koala protections should include higher levels of tree retention. This is consistent with a precautionary approach that reflects the serious or irreversible threat of local extinctions and the uncertainty of predictive maps.¹⁷⁵

¹⁷³ The Koala Browse Tree Prescriptions spatial data set mapping is available to view at https://mapprod2.environment.nsw.gov.au/arcgis/rest/services/IFOA/Coastal_IFOA_ESA/FeatureServer/7

¹⁷⁴ See, for example, cl 186 of the Integrated Forestry Operations Approval for Brigalow Nandewar Region <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestagreements/integrated-forestry-operations-approval-brigalow-nandewar-region-including-amends1-3.pdf?la=en&hash=716C6FE7FF520A68DA9CE0CEB4C81CD04F66C19D>>

¹⁷⁵ See Environmental Defenders Office, *Submission on the Draft Coastal Integrated Forestry Operations Approval*, July 2018, <https://www.edo.org.au/wp-content/uploads/2020/01/180713_Coastal_Draft_IFOA_-_EDONSW_sub_FINAL.pdf>



Our concerns have been amplified following the 2019-2020 bushfires.¹⁷⁶ We are particularly concerned that with limited exception, forestry operations have been able to continue essentially business-as-usual despite clear evidence outlining the impacts of the bushfires on NSW forests, and the need to change the way forests are managed moving forward, including limiting forestry operations in certain areas.¹⁷⁷

Forestry Corporation New South Wales (**FCNSW**) has been subject to a number of recent prosecutions for breaching forestry rules, including in relation to forestry operations in koala habitat – see **Case Study 7 – Recent prosecutions of FCNSW**. However, we note there are limited options for third parties to enforce breaches of the Forestry Act, as unlike other environmental laws, there are no open standing provisions in the Forestry Act.

Both the scientific evidence and recent prosecutions reveal that, for multiple reasons, the framework intended to protect koalas is failing. While an overhaul of the rules is an option, with ongoing concerns about the impacts of forestry operations and the inadequacies of the regulatory framework, and with the koala on a sharp trajectory to extinction, a more appropriate response would be to exclude forestry operations in koala habitat.

Case Study 7 – Recent prosecutions of FCNSW

A spate of recent prosecutions against FCNSW highlights that specific rules intended to protect koalas are being ignored, putting koala habitat and koalas at ongoing risk.

For example:

- FCNSW was prosecuted for logging large Eucalyptus trees in various protected areas, including a Koala Exclusion Zone, in Wild Cattle Creek Forest near Coffs Harbour. In the NSW Land and Environment Court, Justice Robson found that the non-compliant activities had caused harm to koala habitat. Further investigations by the EPA found that the FCNSW undertook further logging of protected koala habitat in 2020 at the same forest.¹⁷⁸
- The Land and Environment Court had also fined FCNSW \$230,000 for mapping errors and logging in exclusion zones at the Dampier state forest in 2019. FCNSW was ordered to

¹⁷⁶ See Environmental Defenders Office, *Submission to the inquiry into the long term sustainability and future of the timber and forest products industry*, 3 June 2021 < https://www.edo.org.au/wp-content/uploads/2021/06/aa6651e94f2a-210603_Inquiry_into_the_longterm_sustainability_of_the_timber_and_forest_products_industry_EDO_submission.pdf >

¹⁷⁷ See, for example:

- Smith, Dr A. *Review of CIOA Mitigation Conditions for Timber Harvesting in Burnt Landscapes - A Report to the NSW Environment Protection Authority*, September 2020, <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cioa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>
- New South Wales Natural Resources Commission, *Final Report, Coastal IFOA operations post 2019/20 wildfires*, June 2021, < <https://www.parliament.nsw.gov.au/lcdocs/other/17530/23%20August%202022%20-%20PC%207%20-%20tabled%20by%20Sue%20Higginson.pdf> >

¹⁷⁸ *Environment Protection Authority v Forestry Corporation of New South Wales* [2022] NSWLEC 70.



undertake an audit of its field mapping and marking activities, and to train forestry operators to correctly carry out these activities.¹⁷⁹

- The FCNSW was fined \$45,000 for logging habitat for endangered species in three areas of the Mogo state forest in 2020, in breach of site specific operating conditions following bushfire damage.¹⁸⁰
- On another occasion, the FCNSW was fined \$15,000 for logging hollow bearing trees which were protected by a post bushfire condition imposed to protect critical habitat in the South Brooman state forest near Bateman's Bay.¹⁸¹
- In March-July 2020 the FCNSW logged more than 50 trees in "unburned" and "partially burned" environmentally significant areas that were recovering from bushfires in the Yambulla state forest.¹⁸²
- FCNSW was also fined \$30,000 when forestry operators had failed to mark up protection zone boundaries, and logged protected trees in the Ballengarra State forest near Port Macquarie.¹⁸³
- FCNSW was fined another \$15,000 for marking errors and logging of protected areas of the forest on the Central Coast between January 2019 and March 2020.¹⁸⁴

10. Bushfire Hazard and Disaster Management Legislation

10.1 Overview

Clearing of vegetation may be allowed under certain hazard and disaster management legislation without development consent or approval, subject to some environmental safeguards. For example:

- **10/50 Code**

The 10/50 Vegetation Clearing Code of Practice for New South Wales¹⁸⁵ (**10/50 Code**) authorises certain clearing under NSW legislation for the purpose of bushfire hazard reduction. In general, the 10/50 Code only applies to land mapped within a 10/50 Vegetation Clearing Entitlement Area. It

¹⁷⁹ *Environment Protection Authority v Forestry Corporation of NSW* [2022] NSWLEC 75.

¹⁸⁰ See NSW EPA, 'Forestry Corporation fined for destroying native animal habitat,' <<https://www.epa.nsw.gov.au/news/mediareleases/2022/epamedia220411-forestry-corporation-fined-for-destroying-native-animal-habitat>>.

¹⁸¹ 6 See NSW EPA, 'Alleged non-compliance with forestry regulations costs Forestry Corporation NSW,' <<https://www.epa.nsw.gov.au/news/media-releases/2022/epamedia220623-alleged-non-compliance-with-forestry-regulations-costsforestry-corporation-nsw>>.

¹⁸² See NSW EPA, 'FCNSW in court for alleged breaches of 2019/20 bushfire harvest rules,' <<https://www.epa.nsw.gov.au/news/mediareleases/2022/epamedia220620-fcnsw-in-court-for-alleged-breaches-of-201920-bushfire-harvest-rules>>.

¹⁸³ See NSW EPA, 'Forestry Corporation fined for failing to mark out a prohibited logging zone,' <<https://www.epa.nsw.gov.au/news/media-releases/2021/epamedia210226-forestry-corporation-fined-for-failing-to-mark-out-a-prohibited-logging-zone>>.

¹⁸⁴ See NSW EPA, 'Forestry Corporation fined for failing to mark out a prohibited logging zone,' <<https://www.epa.nsw.gov.au/news/media-releases/2021/epamedia210218-forestry-corporation-fined-for-failing-to-mark-out-a-prohibited-logging-zone>>.

¹⁸⁵ See <https://www.rfs.nsw.gov.au/plan-and-prepare/1050-vegetation-clearing>



allows trees to be cleared without approval if they are within 10 metres of a home or a farm shed. Underlying vegetation can also be cleared on mapped land if it is within 50 metres of a home or farm shed.

Clause 7.2 of the 10/50 Code sets out types of vegetation that cannot be cleared under the Code. It includes “specified koala habitat mapped in comprehensive Koala Plans of Management and as provided to the NSW RFS by the Department of Planning and Environment”.¹⁸⁶ Presumably, this is core koala habitat mapped in an approved KPoM. The 10/50 Code indicates that in the case of uncertainty, it is the 10/50 online tool that applies.¹⁸⁷ It is also presumed that the online tool would be updated if and when any new KPoM is made and maps are provided to the RFS, but this is not clear.

The 10/50 Code also provides other safeguards for some environmentally sensitive areas and native animals. For example, Clause 7.8 provides that the 10/50 Code does not permit clearing of vegetation where a legal obligation exists to preserve that vegetation by agreement or otherwise (e.g. conservation agreement or condition of consent). Clause 7.9 provides that “landowners have a duty of care to avoid cruelty and harm to native, introduced or domestic animals when clearing trees and vegetation in accordance with the 10/50 Scheme”.¹⁸⁸ For example, landowners who clear trees and vegetation under the 10/50 Scheme are not exempt from prosecution under the *National Parks and Wildlife Act 1974* for harm to protected fauna, or for deliberate cruelty to animals under the *Prevention of Cruelty to Animals Act 1979*. Operating in accordance with the 10/50 Code does not absolve the landowner from their responsibility for avoiding harm to protected fauna or deliberate cruelty to animals.

- **Rural Boundary Clearing Code**

The Rural Boundary Clearing Code¹⁸⁹ authorises owners or occupiers of rural zoned land to clear vegetation for the purpose of bush fire hazard mitigation if it is on land within the rural zone, within the Boundary Clearing Code Vegetation Map and within 25 metres of the holding’s boundary with adjoining land.

Clause 6.2 provides that “Core Koala habitat identified at Attachment ‘A’ as mapped and provided to the NSW RFS by the Department of Planning, Industry and Environment” cannot be cleared under the Code. Currently, approved KPoMs are listed in Attachment A.¹⁹⁰ In the case of a holding affected

¹⁸⁶ See 7.2 of the 10/50 for the full list of vegetation that cannot be cleared under the Code.

¹⁸⁷ <https://www.rfs.nsw.gov.au/plan-and-prepare/1050-vegetation-clearing/tool>

¹⁸⁸ Clause 7.9 states “landowners who clear trees and vegetation under the 10/50 Scheme are not exempt from prosecution under the *National Parks and Wildlife Act 1974* for harm to protected fauna, or for deliberate cruelty to animals under the *Prevention of Cruelty to Animals Act 1979*. Operating in accordance with the 10/50 Code does not absolve the landowner from their responsibility for avoiding harm to protected fauna or deliberate cruelty to animals”.

¹⁸⁹ https://www.rfs.nsw.gov.au/_data/assets/pdf_file/0014/231422/Rural-Boundary-Clearing-Code-for-New-South-Wales.pdf

¹⁹⁰ Namely:

- Ballina Shire Council Comprehensive Koala Plan of Management;
- Bellingen Shire Council Comprehensive Koala Plan of Management;
- Byron Coast Comprehensive Koala Plan of Management;
- Campbelltown City Council Comprehensive Koala Plan of Management;
- Coffs Harbour City Council Comprehensive Koala Plan of Management;
- Kempsey Shire Council Comprehensive Koala Plan of Management;
- Lismore City Council Comprehensive Koala Plan of Management;



by bush fire between 1 July 2019 and 31 March 2020, protections for core koala habitat were retained, despite other temporary exemptions from clause 6.2 being in place until 25 November 2022 (see clause 6.3).

Similar to the 10/50 Code, the Rural Boundary Clearing Code provides that clearing under the Code cannot be inconsistent with certain legal agreements (clause 6.9) and landowners have a duty of care to avoid cruelty and harm to native, introduced or domestic animals when clearing trees and vegetation in accordance with the Rural Boundary Clearing Code (clause 6.10).

- **NSW Reconstruction Authority Act 2022**

In November 2022, the NSW Parliament passed the *NSW Reconstruction Authority Act 2022*. It has not yet commenced. The purpose of the Act is to “establish the NSW Reconstruction Authority to facilitate prevention, preparedness, recovery, reconstruction and adaptation for the impact of disasters in NSW and to improve resilience for potential disasters”. The Act gives the proposed new authority broad powers to undertake activities, essentially overriding many environment and planning protections.

Last minute amendments to the NSW Reconstruction Authority Bill 2022 in the NSW Legislative Council inserted a safeguard for native vegetation. Under section 12 of the Act, the Authority may only carry out development if the development will not involve clearing native vegetation or will involve clearing native vegetation only to the minimum extent necessary. It is unclear how this subsection would operate in practice, and whether it would prevent the Authority from clearing koala habitat in order to carry out development.

10.2 Key issues for koalas

The policy intention of both 10/50 Code and Rural Boundary Code is to preclude clearing under the 10/50 Code in core koala habitat. However, as noted earlier in the report, the limited scope of mapped core koala habitat means this safeguard has limited application. Further, the *Reconstruction Authority Act 2022* gives the Authority wide reaching powers with no explicit protection for koala habitat and with no clarity about how safeguards for native vegetation will operate in practice.

It is noted though that none of the above Codes or laws override the Commonwealth EPBC Act. That is, if the clearing would have a significant impact on a matter of national environmental significance (including koalas) it requires approval under the EPBC Act.

viii. Port Stephens Council Comprehensive Koala Plan of Management;
ix. Tweed Coast Comprehensive Koala Plan of Management.



11. Protected areas

11.1 Overview

Protected areas are areas set aside for conservation purposes and can occur on both public and private land. For example:

- **Public land** - The key objectives of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) include the conservation of nature and management of land reserved under the Act. The NPW Act allows areas of public land to be reserved and managed for various purposes including as a national park, state conservation area, regional park, or nature reserve.
- **Private land** - Under the BC Act, areas of private land may be set aside for conservation via formal agreements, including conservation agreements, and wildlife refuge agreements. These agreements may be fixed-term or in perpetuity and require land to be managed for conservation purposes. Landholders may also choose to register their land with a private conservation program without entering into a private conservation agreement. Conserving biodiversity on private land augments the public reserve system, and is important at a landscape scale where koala habitat or corridors may cross various land tenures, including private land. More information on private land conservation is available in EDO's publication *Defending the Unburnt - A guide to private land conservation for landholders*.¹⁹¹

11.2 Key issues for koalas

Protected areas on both public and private land can play a key role in protecting koalas and koala habitat.

For example:

- Key actions in the *NSW Koala Strategy* include purchasing high-quality koala habitat on private land to add to the national park estate and investing in private land conservation programs through the NSW Biodiversity Conservation Trust (**BCT**).¹⁹²
- The *NSW National Parks Establishment Plan* prioritises the reservation of critical landscape corridors, which may include koala corridors.¹⁹³
- The Cumberland Plain Conservation Plan proposes new areas to be reserved as national parks and reserves under the NPW Act as well as the establishment of biodiversity stewardship sites on private land under the BC Act.

¹⁹¹ Environmental Defenders Office, *Defending the Unburnt - A guide to private land conservation for landholders*, September 2021 < <https://www.edo.org.au/wp-content/uploads/2022/05/private-land-conservation-2.pdf> >

¹⁹² *NSW Koala Strategy*, p 18.

¹⁹³ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Parks-management-other/new-south-wales-national-parks-establishment-plan-080052.pdf>



- The NSW BCT has dedicated rounds of conservation tenders (targeted funding for landholders to enter into private land conservation) targeted at koala protection. To date, this has included the Northern Inland Koala conservation tender, Southern Highlands Koala Habitat conservation tender, Koala Habitat, Lismore conservation tender and Koala Habitat, Port Macquarie conservation tender.¹⁹⁴

While the establishment of new protected areas is important, the legal mechanisms needed to implement these tools are already available and are not a priority for law reform. Further, new commitments to add areas to the National Park Estate, establish new private land conservation agreements, or restore degraded landscapes provide limited refuge for koalas, in circumstances where contradictory policy settings continue to allow land to be cleared elsewhere. The conservation of koalas in protected areas needs to be supported by robust protections for koalas outside these areas as well.

12. Commonwealth EPBC Act

12.1 Overview

The Commonwealth EPBC Act regulates activities that have an impact on matters of national environmental significance (**MNES**). This includes threatened species that are listed under the EPBC Act, including the koala which was uplisted as endangered in February 2022. This means that if any kind of development will have, or is likely to have, a significant impact on a MNES, like the koala, it must be referred to the Commonwealth Environment Minister for assessment (and will potentially require approval) under the EPBC Act. There is however an exemption for forestry operations carried out in accordance with a Regional Forest Agreement (**RFAs**) - see **Box 5 - EPBC Act and forestry operations**. In accordance with this exemption, forestry operations in NSW conducted under an IFOA or PNF approval do not require approval under the EPBC Act if in an area covered by an RFA.

12.2 Key issues for koalas

The EPBC Act is failing to protect and conserve Australia's biodiversity. The *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (**Samuel Review**) found that the EPBC Act has failed to achieve its objectives and needs a complete overhaul. The *Australia State of the Environment 2021* report concluded that the EPBC Act is not effective in delivering improved outcomes for biodiversity, or in arresting biodiversity declines, and does not facilitate effective management of pressures or restoration on the environment.

¹⁹⁴ See <https://www.bct.nsw.gov.au/current-conservation-tenders>



EDO has written extensively regarding our concerns with the EPBC Act.¹⁹⁵ We are particularly concerned that:

- The EPBC Act does little to protect threatened species' habitat. For example, threatened species habitat (including potential koala habitat) has been, and continues to be, extensively cleared with little to no regulatory oversight by the Federal Government.¹⁹⁶
- The EPBC Act does not automatically protect areas critical to the survival of a threatened species (critical habitat) – this is a discretionary process undertaken by the Minister.
- The EPBC Act does not require assessment and approval of cumulative impacts of individual vegetation clearing across the landscape.
- The Environment Minister has the discretion to allow development even where it will have a significant impact on a MNES. Indeed, it is rare for the Minister to prohibit development.¹⁹⁷
- The EPBC Act specifically prohibits the Environment Minister from considering new 'listing events' (e.g., a threatened species being added to the threatened species list or uplisted from vulnerable to endangered) when exercising their power to:
 - reconsider a decision to declare an action a controlled action (a controlled action requires assessment and determination under the EPBC Act); or
 - revoke/vary/suspend an approval.
- Enforcing the EPBC Act has historically proven to be ineffective, partially owing to the under-resourcing of the relevant governmental agencies.

In December 2022, the Federal Government responded to the Samuel Review and committed to overhauling Australia's national environmental laws. As part of the proposed reforms, the Federal Government has indicated it will develop regional plans, which, if implemented, could play an important role in protecting koala habitat in NSW– see **Box 6 – Regional Planning**.

¹⁹⁵ See, for example:

- Environmental Defenders Office, *Submission to the 10 year review of the EPBC Act*, April 2020, <<https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>>
- Environmental Defenders Office, *Inquiry into Australia's faunal extinction crisis*, September 2018, <[https://www.edo.org.au/wp-content/uploads/2019/12/180907 - Fauna Extinction Inquiry - EDOs of Australia submission.pdf](https://www.edo.org.au/wp-content/uploads/2019/12/180907_-_Fauna_Extinction_Inquiry_-_EDOs_of_Australia_submission.pdf)>
- Environmental Defenders Office, *Supplementary submission to the inquiry into Australia's extinction crisis*, August 2022, <<https://www.edo.org.au/publication/edo-supplementary-submission-to-the-inquiry-into-australias-extinction-crisis/>>

¹⁹⁶ The SOE Report found that between 2000 and 2017, 7.7 million hectares of potential habitat for terrestrial threatened species was cleared and that 93% of that was not referred to the Federal Government for assessment under the EPBC Act.

¹⁹⁷ For example, the Parliament of Australia *Budget Review 2020-21 - Environmental Approvals* states that "(S)ince the EPBC Act commenced in 2000, only 13 projects have been refused at the approval stage compared to over 1,000 projects that have been approved"

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/EnvironmentalApprovals>



EDO will continue to engage on national environment law reform, including with respect to improved national oversight of forestry operations and improved protections for koalas, including through the development of new National Environmental Standards and new regional plans.

Box 5 – EPBC Act and forestry operations

RFAs are agreements between State and Commonwealth governments outlining responsibilities in relation to native forest management, which aim to balance the competing goals of protection of native forests and ecologically sustainable wood production in native forests. There are currently ten RFAs in force in Australia (five in Victoria, three in NSW (Eden, North East, and Southern),¹⁹⁸ and one each in Western Australia and Tasmania).

When forestry operations are conducted in accordance with an RFA, approval under Part 3 of the EPBC Act is not required.¹⁹⁹

EDO research, legal actions and case studies have continuously found that the RFA exemption in the Act has not adequately protected the at-risk species that live in Australian forests, including koalas.²⁰⁰

As part of the proposed reform to Australia's national environmental laws, the Federal Government recently announced that it would work towards applying new National Environmental Standards to RFAs:

¹⁹⁸ See <https://www.dpi.nsw.gov.au/forestry/regional-framework>

¹⁹⁹ See RFA Act s 6(4); EPBC Act s 38(1). We note the recent decision of the Federal Court in *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66. The Friends of Leadbeater's Possum have indicated an intention to appeal that decision to the High Court. There is also ongoing uncertainty arising from the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020. See EDO's submission to that inquiry here: <https://www.edo.org.au/wp-content/uploads/2021/04/210319-EPBC-RFA-Amendment-Bill-Inquiry-EDO-submission.pdf>. The interaction between the RFA Act and the EPBC Act was also considered by the Samuel 10-year review of the EPBC Act, and Recommendation 15 of the Final Report of the Independent Review of the EPBC Act (<https://epbcactreview.environment.gov.au/resources/final-report>) provided that:

- a) The Commonwealth should immediately require, as a condition of any accredited arrangement, States to ensure that RFAs are consistent with the National Environmental Standards.
- b) In the second tranche of reform, the EPBC Act should be amended to replace the RFA 'exemption' with a requirement for accreditation against the National Environmental Standards, with the mandatory oversight of the Environment Assurance Commissioner.

²⁰⁰ See, for example:

- Environmental Defenders Office, *Submission to the 10 year review of the EPBC Act*, April 2020, <<https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>>;
- Environmental Defenders Office, 'First ever legal challenge to NSW Forest Logging Agreement begins' 28 March 2022 <[edo.org.au/2022/03/28/nsw-forest-logging-agreement-faces-legal-challenge-over-climate-biodiversity/](https://www.edo.org.au/2022/03/28/nsw-forest-logging-agreement-faces-legal-challenge-over-climate-biodiversity/)>;
- Environmental Defenders Office and Places You Love, *Devolving extinction? The risk of handing environmental responsibilities to state & territories*, October 2020 <<https://www.edo.org.au/wpcontent/uploads/2020/10/201004-EDO-PYL-Devolving-Extinction-Report-FINAL.pdf>>;
- Feehely, J., Hammond-Deakin, N. and Millner, F. *One Stop Chop: How Regional Forest Agreements streamline environmental destruction*, 2013, Lawyers for Forests, Melbourne Australia https://www.envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/One_Stop_Chop.pdf



“The government will work with stakeholders and relevant jurisdictions towards applying National Environmental Standards to Regional Forest Agreements to support their ongoing operation together with stronger environmental protection. The timing and form of this requirement will be subject to further consultation with stakeholders. Consultation will consider future management and funding opportunities under voluntary environmental markets”.²⁰¹

However, the detail and design of this proposal is yet to be determined.

It is, therefore, unclear whether the current RFA exemption will continue, or whether RFA-covered forestry operations will require assessment and approval by the Commonwealth Environment Minister under the new laws. It is also unclear at this stage how proposed new regional plans will interact with RFAs.

Box 6 – Regional Planning

The Federal Government has indicated that it will introduce regional plans under new national environmental laws. The *Nature Positive Plan: better for the environment, better for business (NPP)* states that these plans “will be built around a three-level (traffic light) map, designed to pre-identify areas for protection, restoration and sustainable development. Regional plans will also identify priority areas for action and investment and help ensure Australia meets its biodiversity outcomes including the 30x30 target”.²⁰²

According to the NPP, regional plans will be required to deliver outcomes set in the National Environmental Standard for Matters of National Environmental Significance (which is yet to be developed). Regional plans will be informed by relevant conservation plans and underpinned by strong data and made in accordance with a national standard for Regional Planning (which is also yet to be developed). They will be subject to approval by the Commonwealth Environment Minister, and negotiated with relevant states or territories, regional natural resource management bodies, and local government.

As noted above, the regional plans will be built around a three-level (traffic light) map, which, according to the NPP, will work as follows:

- Areas of High Environmental Value - where development will largely be prohibited. These are areas of high environmental sensitivity, including with World Heritage or National Heritage values, Ramsar wetlands, critical habitat for threatened species and other areas of high conservation significance.
- Areas of Moderate Environmental Value - where development will be allowed, subject to an approval process and any agreed rules. These are areas of moderate environmental sensitivity that may contain matters of national environmental significance. Development

²⁰¹ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business*, December 2022, p4 <<https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>>

²⁰² This is a reference to the worldwide initiative for governments to designate 30% of Earth's land and ocean area as protected areas by 2030.



in these areas will be required to adhere to the mitigation hierarchy, under which impacts should be avoided then mitigated or, if this is not possible, offset (either by securing environmental offsets or making conservation payments) in accordance with any priorities identified in the regional plan.

- Development Priority Areas - where the planning process has determined development can proceed without a separate Commonwealth environmental approval. Consistent with current practice, state and territory planning and environmental approvals will still be required for certain types of land use and development in the Development Priority Areas.

Once regional plans are in place, individual projects will, according to the NPP, need to demonstrate compliance with the plan.

While these plans could play an important role in protecting koala habitat in NSW, the government is not intending to complete the first round of regional planning by 2028. Moreover, until we see the specific detail and design, it is unclear how the plans will work in practice, and whether the above traffic light system will be implemented in full (and how it will apply to koalas and other threatened species and the habitat considered critical to their survival).

The Federal Government has indicated that in the interim, proposed developments likely to have a significant impact on MNES will follow an assessment process similar to that which will apply in Areas of Moderate Environmental Value in a regional plan.

12. CONCLUSION AND KEY RECOMMENDATIONS

At first glance, it appears that NSW laws are set up to support our furry friends. From the *NSW Koala Strategy*, through to the Koala SEPPs, identification of core koala habitat in KPOMs, and specific ecological prescriptions for koalas in forestry rules, there are a range of laws and policies aimed at protecting koalas and their habitat.

However, once you dig into the detail, it becomes clear that the laws are not delivering effective protections for koalas. Poorly implemented laws are allowing koala habitat to fall through the cracks, and when safeguards are triggered, policy settings that do not align with best practice and decision-maker discretion undermine the effectiveness of those safeguards. Further, many of the recent initiatives by government to address koala conservation have focused mainly on funding and policy, without substantial legislative or regulatory reform to increase legal protections for koala populations and their habitat.

It is well-known that ongoing habitat fragmentation, modification, and loss from human activities, and the related impacts including vehicle strikes, dog attacks and stress-invoked disease, are the biggest threats to koalas. Yet, despite this, our relevant planning, environment, and natural resource laws continue to facilitate the destruction of koala habitat.

In order to stop the fragmentation, modification, and loss of koala habitat, we need urgent reform and improved implementation of our laws and policies, to ensure koala habitat is properly identified, impacts on koala habitat are being assessed under appropriate assessment and



determination pathways, safeguards are effectively managing impacts on koalas, and other conservation and strategic planning tools are being utilised.

To that end, we have identified the following key areas of reform:

- A. Ensure legal protections apply to *all* koala habitat by implementing consistent, comprehensive mapping across NSW as a matter of urgency**
- B. Maximise protection of koala habitat by mandating appropriate and consistent levels of oversight**
- C. Bolster safeguards in assessment and determination processes**
- D. Prohibit logging in koala habitat**
- E. Improve accountability and enforcement of laws**
- F. Optimise the use of conservation and strategic planning tools**
- G. Overhaul national environmental laws**

We discuss these key areas and specific recommendations below.

A. Ensure legal protections apply to *all* koala habitat by implementing consistent, comprehensive mapping across NSW as a matter of urgency

The report highlights that, at present, NSW laws deliver only a half-hearted effort to genuinely protect koala habitat. There is, in theory, a policy intention to safeguard core koala habitat. For example:

- The Koala SEPPs establish specific assessment and determination requirements for core koala habitat.
- Under the LLS Act, core koala habitat is earmarked as category 2-sensitive land, meaning it is off limits to code-based land clearing; and there are targeted rules for allowable activities.
- Previously, core koala habitat was off limits to PNF. While former protections have been carried over into new PNF Codes, any newly mapped core koala habitat will not receive the same protections.
- Under bushfire hazard management rules, clearing cannot be undertaken in core koala habitat.

However, in practice, the failure of all relevant LGAs to map core koala habitat in an approved KPOM means these safeguards have limited application. That is, the laws are not operating as intended to protect core koala habitat. This key issue can be resolved by ensuring all koala habitat is identified and mapped for the purpose of triggering existing and strengthened safeguards. Further, as noted above, relying on the current definition of core koala habitat may not capture all koala habitat that requires protection. The laws must apply a legal definition of koala habitat that is consistent with current science and captures all koala habitat that should be protected.



Key recommendations:

Recommendation 1: Apply a scientifically robust, and clearly defined, definition of koala habitat to be used consistently across various legal frameworks.

Recommendation 2: Map all koala habitat in approved maps as a matter of urgency. This could be achieved by either:

- the NSW Government funding relevant local councils to develop maps as part of koala plans of management (KPoMs) under the Koala SEPPs, and legislating a timeframe for the finalisation of plans; or
- the NSW Government leading the development of a single, state-wide map of koala habitat to be adopted in law.

Recommendation 3: Update all relevant laws to align legal definitions of and protections for koala habitat with approved maps.

B. Maximise protection of koala habitat by mandating appropriate and consistent levels of oversight

The recent political koala wars have left NSW laws in a state of limbo; temporary Koala SEPP arrangements remain in place and non-sensical (from an ecological perspective) distinctions between various land tenures and activity types have led to a confusing, mismatched set of rules.

There must be consistent, certain protections for koala habitat across development and land clearing frameworks.²⁰³ The Government must abandon plans to ‘decouple’ koala protections, and instead ensure there are consistent, robust protections for koalas across all frameworks.

Additionally, activities that will impact on koala habitat must be directed into the most robust assessment and determination pathway. Only genuinely low impact activities should be able to be carried out without relevant approval. Code-based habitat clearing activities are not suitable in environmentally sensitive areas like koala habitat, and this needs to be applied consistently and thoroughly. The simplest way of achieving this would be to implement state-wide mapping of koala habitat as a matter of urgency in line with Recommendations 1 - 3.

²⁰³ This is generally consistent with Recommendation 1 of the Independent Biodiversity Legislation Review Panel, which recommended levelling the playing field for agricultural development and land management activities. See *Independent Biodiversity Legislation Review Panel, Final Report*, December 2014 <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/review-biodiversity-legislation-nsw-final-report-2014.pdf?la=en&hash=EBC3E6AF8D1441AA9C80CB4DD2B3FACC3BAE8ECF>



In summary:

- **EP&A Act**

- **Exempt development:** Only genuinely low impact development should be allowed as exempt development. It is noted that declaring areas of koala habitat as AOBVs will invoke the existing exclusion in cl 1.16 of the Exempt and Complying Development SEPP that exempt development must not be carried out in an AOBV.
- **Complying development:** Complying development must not be carried out in koala habitat. This can be achieved by updating the definition of ‘*environmentally sensitive area*’ in cl 1.5 of the Exempt and Complying Development SEPP to explicitly include koala habitat and by implementing state-wide mapping of koala habitat as a matter of urgency in line with Recommendations 1 - 3.
- **Part 4 Development, including SSD:** Safeguards for Part 4 development should be strengthened and applied consistently to all Part 4 development including SSD. See specific recommendations below.

- **Part 5A LLS Act**

- **Allowable activities:** Only genuinely low impact activities should be permitted as allowable activities. Existing special provisions applying to allowable activities on category 2-vulnerable regulated land and category 2-sensitive regulated land would have broader application if koala habitat was comprehensively mapped per Recommendations 1 - 3.
- **Code-based clearing:** The current exclusion from undertaking code-based clearing on category 2-sensitive regulated land, including core koala habitat, would have broader application if koala habitat was comprehensively mapped per Recommendations 1 - 3. This exclusion should be retained (i.e. the Government should abandon plans to decouple land clearing rules from the Koala SEPP).
- **Approval by NVP:** Safeguards for assessing and determining applications to the NVP should be strengthened. See specific recommendations below.

- **Vegetation in non-rural areas SEPP**

- **Allowable activities:** In general, allowable activities set out in Part 2.5 of the Biodiversity and Conservation SEPP are similar to types of allowable activities allowed on category 2 vulnerable and sensitive land under Schedule 5A, Part 4 of the LLS Act. The Government should also abandon plans to expand the scope of allowable activities to include sustainable grazing, clearing to remove imminent risk to life or property, removing invasive native species, and native vegetation thinning. These are not allowable activities on rural land (some of these activities are regulated via the Land Management Code on rural land), and it would be inappropriate to allow these as allowable activities on non-rural land. These should remain as activities that require a permit or approval.



- **Clearing that requires a council permit:** Clearing that is not genuinely low impact should continue to require a council permit (or approval by the NVP Panel).
- **Clearing that requires approval from the Native Vegetation Panel:** Safeguards for assessing and determining applications to the NVP should be strengthened. See specific recommendations below.

Key recommendations:

Many of the key concerns regarding appropriate assessment and approval pathways can be remedied by implementing comprehensive mapping of koala habitat, per Recommendations 1 - 3. However, we also make the following specific recommendations:

Recommendation 4: Direct all proposals likely to have an impact on koala habitat into the most robust assessment pathway. In particular:

- Strictly limit the scope of allowable activities under the *Local Land Services Act 2013* (LLS Act).
- Ensure only genuinely low impact activities are permitted as allowable activities under the Vegetation in non-rural areas SEPP. The Government should abandon plans to expand the scope of allowable activities to include sustainable grazing, removing invasive native species, and native vegetation thinning. These should remain as activities that require a permit or approval.
- End code-based clearing of koala habitat for agricultural and urban development. All such proposals must be subject to full environmental assessment. This can be achieved by:
 - updating the definition of ‘*environmentally sensitive area*’ in cl 1.5 of the Exempt and Complying Development SEPP to explicitly include koala habitat; or
 - ensuring all koala habitat (not just that currently mapped as core koala in KPOM) is categorised as category 2-sensitive land.

Recommendation 5: Abandon plans to ‘decouple’ koala protections from rural land. There must be consistent, robust mapping and protections for koalas across all land tenures.

C. Bolster safeguards in assessment and determination processes

Recommendation 4 should ensure that activities that will impact on koalas and koala habitat are directed into an approval pathway requiring robust environmental assessment and determination. However, as outlined in our analysis, even safeguards in these pathways are failing. We recommend that safeguards are strengthened.



Key recommendations:

Recommendation 6: Reform biodiversity laws to strengthen protections for koala populations and habitat, including by:

- a) Re-introducing provisions to list specific koala populations as a separate listing, irrespective of whether a species is already listed;
- b) Giving stronger legislative effect to the Save our Species (SoS) program;
- c) Impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
- d) Require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider.

Recommendation 7: Overhaul the NSW Biodiversity Offsets Scheme in line with best practice. In particular:

- a) Offsets must be designed to improve biodiversity outcomes.
- b) Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts.
- c) Legislation and policy must set clear limits on the use of offsets.
- d) Offsets must not be available for development or activities that will clear or impact on areas of high environmental value, including important threatened species habitat.
- e) Offsets must be based on genuine 'like for like' principles.
- f) Time lags in securing offsets and gains should be minimized.
- g) Indirect offsets must be strictly limited.
- h) Discounting and exemptions should not be permitted.
- i) Offsetting must achieve benefits in perpetuity.
- j) Offsets must be additional.
- k) Offset arrangements must be transparent and legally enforceable.
- l) Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered.
- m) Offset frameworks should build in mechanisms to respond to climate change and stochastic events.

Recommendation 8: Strengthen the 'serious and irreversible impacts' mechanism to more accurately reflect the principles of ecologically sustainable development. Specifically:

- a) Reframe the standard as serious 'or' irreversible impacts.
- b) Require the test to be applied objectively, not subjectively (i.e. – not in the opinion of the decision maker).
- c) References to extinction risk should be clarified to refer to an appropriate scale and scope (see Principles applicable to determination of "serious and irreversible impacts on biodiversity values").
- d) Consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species.
- e) Provide specific guidance on the application of serious and irreversible impacts (SII) to koalas and koala habitat.



- f) The mandatory requirement to refuse development proposals that will have serious and irreversible impacts on biodiversity should be applied to both state significant developments and state significant infrastructure (replacing the current discretionary application of the mechanism).

Recommendation 9: Address ongoing concerns with the operation and implementation of the Koala SEPP. Specifically:

- a) Adopt a single Koala SEPP for use across all relevant local government areas (LGAs).
- b) Update the list of LGAs to which the Koala SEPP applies to ensure it encompasses all relevant LGAs.
- c) Finalise Guidelines as a matter of urgency.
- d) Clarify the application of the Koala SEPP to regionally significant development and state significant development.
- e) Ensure all koala habitat is mapped (see Recommendations 1 - 3).
- f) Remove the arbitrary 1 ha threshold from the Koala SEPP.

D. Prohibit logging in koala habitat

Forestry operations are regulated under legally distinct frameworks, and the Koala SEPP, BOS, and conditions of consent/approval have no application. Instead, impacts on koalas are managed through species specific ecological prescriptions contained in the PNF Code (in the case of PNF regulated under Part 5B of the LLS Act), or in IFOAs (in the case of forestry operations regulated under the Forestry Act).

There is no ecological reason to ‘grandfather’ restrictions on PNF core koala habitat to only those areas identified in April 2022. This policy decision, an outcome of the koala wars, should be abandoned. In accordance with the broader recommendations of this report, comprehensive mapping of koala habitat should be implemented, and these areas should be off limits to PNF.

Both the scientific evidence and recent prosecutions reveal that, for multiple reasons, the framework for regulating public native forestry is failing to protect koalas. While an overhaul of the rules is an option, with ongoing concerns about the impacts of forestry operations, the inadequacies of the legal framework, and the koala on a sharp trajectory to extinction, a more appropriate response would be to exclude forestry operations in koala habitat.

Key recommendations:

Recommendation 10: Reinstate a comprehensive exclusion of private native forestry (PNF) in all koala habitat. Specifically, PNF should be excluded in all koala habitat, and this should be properly implemented by completing comprehensive koala habitat mapping in all relevant LGAs per Recommendations 1 - 3.

Recommendation 11: Prohibit public land native forest logging in koala habitat. This can be implemented by finalising comprehensive mapping of koala habitat and introducing exclusions for forestry operations in these areas.



E. Improve accountability and enforcement of laws

As with all regulatory regimes, accountability and enforcement are vital for ensuring laws are properly implemented and the aims and objectives of the laws are being met. Laws aimed at protecting koalas need to be properly implemented and enforced for them to be effective.

Key recommendations:

Recommendation 12: Improve transparency by ensuring public registers are in place and information available on public registers is comprehensive and readily accessible. This includes registers of approvals for development, clearing and forestry, offset agreements, biodiversity certificates etc.

Recommendation 13: Improve reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved. This can include, for example, monitoring and reporting on set aside obligations under clearing laws, biodiversity offsets obligations under development approvals and clearing approvals, and mitigation measures under biodiversity certificates.

Recommendation 14: To improve accountability, ensure that third party appeal rights are available, including third party merit appeal rights for major projects under the EP&AA Act and open standing to enforce breaches of the Forestry Act.

Recommendation 15: Compliance and enforcement policies should identify and promote opportunities to seek remedies for unlawful activities that include restoration and enhancement of koala habitat.

F. Optimise the use of conservation and strategic planning tools

In addition to a robust regulatory framework, conservation and strategic planning tools can play a key role in protecting koala habitat and contribute to reverse the decline of koalas.

Key recommendations:

Recommendation 16: Make better use of the area of outstanding biodiversity value (AOBV) mechanism to protect koala habitat, including by:

- a) Declaring SoS sites (outside national parks and reserves) AOBVs; and funding these AOBVs for protection and making them off-limits from harm – including by mining interests (which otherwise continue to override biodiversity protection);
- b) Removing the requirement for third parties to obtain landholder support prior to nominating an area as an AOBV.

Recommendation 17: Continue and enhance funding to protected areas including national parks and conservation agreements on private land. This should include continued targeted



funding for the NSW Biodiversity Conservation Trust to drive an uptake in private land conservation in priority koala habitat areas.

G. Overhaul national environmental laws

The EPBC Act is failing to protect and conserve Australia's biodiversity. In December 2022, the Federal Government responded to the Independent Review of the EPBC Act and committed to overhauling Australia's national environmental laws. This is a key opportunity to ensure that these laws are up to the task of protecting nationally listed threatened species, including koalas, and reversing the extinction crisis.

Key recommendations:

Recommendation 18: Overhaul national environmental laws to effectively protect koalas and koala habitat. Specifically:

- a) Prioritise the implementation of the proposed new National Environmental Standard for Regional Planning and regional plans to ensure timely protection for koalas (this should not be delayed until 2028).
- b) Identify koala habitat in proposed new regional plans to ensure these areas are priority areas for action.
- c) Ensure that any koala habitat that is critical to the survival of koalas is declared as 'critical habitat' and designated 'red' – high environmental values.
- d) Develop a National Environmental Standard for koalas setting out specific requirements for activities that will have a significant impact on koalas, including restrictions on clearing koala habitat.
- e) Ensure all proposed National Environmental Standards are outcomes-focused and legally binding on all decisions and functions under the EPBC Act.
- f) More broadly, strengthen threatened species safeguards in both threat abatement and recovery planning, and assessment and determination processes.



Appendix 1 – Summary of the various maps identifying areas of koala habitat

In NSW, areas of koala habitat are mapped for various specific purposes, using different criteria to determine what is identified for that specific purpose. For example:

- **Core koala habitat mapping:** Core koala habitat is defined in the Koala SEPPs and identified in approved Koala Plans of Management (**KPoM**) made under the Koala SEPPs. The Koalas SEPPs set out specific requirements for development proposed to be undertaken in core koala habitat. Additionally, the idea of core koala habitat is picked up in other legal frameworks, which generally define core koala habitat as identified in a KPoM. For example, under Part 5A of the LLS Act core koala habitat identified in an approved KPoM must be designated as category 2- regulated land for the purpose of the Native Vegetation Regulatory Map (**NVR Map**),²⁰⁴ and specifically category 2 – sensitive regulated land.²⁰⁵ Core koala habitat identified in a KPoM is a type of land identified on the Biodiversity Values Map (**BV Map**) under the BC Act. The BV Map forms part of the Biodiversity Offsets Scheme (**BOS**) threshold, which is one of the factors for determining whether the BOS applies to a clearing or development proposal.
- **Site Investigation Area for Koala Plans of Management Map:** The purpose of the Site Investigation Area for Koala Plans of Management Map (**SIA Map**) is to identify land that can be investigated by councils for the purpose of identifying core koala habitat in a KpoM. Only land identified in the SIA Map can be mapped as core koala habitat. The SIA Map only operates under Koala SEPP 2021. The now repealed *Koala Habitat Protection Guideline* indicated that the SIA Map “identifies areas that are likely to have koala use trees and excludes areas with a low probability of koala habitat”.²⁰⁶
- **PNF Core Koala Habitat maps:** For the purpose of new PNF Codes, new ‘PNF Core Koala Habitat’ maps identify areas of core koala habitat where PNF cannot be carried out.²⁰⁷ We understand the PNF Core Koala Habitat maps reflect the KpoM maps of core koala habitat in place as at April 2022, but are not intended to be updated if new KpoMs are made.
- **PNF Koala Prescription Map – high koala habitat suitability:** Under new PNF Codes, additional PNF Koala Prescription Maps have been developed. These maps are intended to identify areas of ‘high koala habitat suitability’ for the purpose of imposing additional prescriptions (rules) that apply to PNF undertaken in areas identified on a PNF Koala Prescription Map. The PNF Koala Prescription Map and concept of ‘high koala habitat suitability’ is unique to the PNF framework. Part 5B of the LLS Act (which governs PNF) does not specifically define or require the identification of areas of ‘high koala habitat suitability’. The concept of high koala habitat suitability is introduced in the PNF Codes and is not explicitly defined. An explanation of how areas of ‘high koala habitat suitability’ have been identified for the purpose of the PNF Koala Prescription Map is

²⁰⁴ LLS Act, s 60I(2)(j), LLS Regulation, cl 111

²⁰⁵ LLS Regulation, cl 108(2)(b)

²⁰⁶ Department of Planning, Industry and Environment, *Koala Habitat Protection Guideline - Implementing State Environmental Planning Policy (Koala Habitat Protection) 2019*, March 2020, available at https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/A+Activation/Final+Koala+Habitat+Protection+Guideline+2020+02+28.pdf

²⁰⁷ See, for example, clause 8.5 of the PNF Code for Northern NSW.



set out in the NSW Natural Resources Commission's (NRC) *Final report - Advice on finalising Draft Private Native Forestry Codes of Practice*.²⁰⁸

- **Koala Habitat Mapping for State Forests:** The identification of koala habitat for the purpose of regulating forestry operations within State forests is varied:
 - *Koala Habitat Mapping project:* The NSW Environment Protection Authority (EPA) undertook a Koala Habitat Mapping project to pilot alternative approaches to the identification and management of important koala habitat in native forestry areas in northern NSW.²⁰⁹ According to the EPA's website, the project had a role in informing updated IFOAs, updated PNF Codes and the development of the *NSW Koala Strategy*.
 - *Koala Browse Tree Prescriptions spatial data set:* Under the current Coastal IFOA, prescriptions for koalas are triggered in areas identified as either 'Koala browse prescription 1' or 'Koala browse prescription 2' in the Koala Browse Tree Prescriptions spatial data set.²¹⁰
 - In other regions regulated by IFOAs (Brigalow Nandewar, South-Western Cypress, Riverina Red Gum), koala prescriptions apply generally and are, in general, triggered by looking for koalas prior to undertaking logging operations.²¹¹
- **Areas of Regional Koala Significance:** The NSW government has mapped Areas of Regional Koala Significance (ARKS) across NSW identifying areas where koalas are known to occur in moderate to high densities.²¹² ARKS have been developed to guide the government in prioritising areas to invest in for habitat conservation and restoration, including through the NSW Government's Save our Species program²¹³ and *NSW Koala Strategy*.²¹⁴ ARKS have no legal status. They do not trigger any additional legal requirements or protections.
- **Statewide Koala Habitat Information Base:** The statewide Koala Habitat Information Base has been developed as part of the *NSW Koala Strategy*. It is not a regulatory tool – that is, it does not identify and categorise land for the purpose of triggering and implementing laws. Rather, it simply aims to collate various layers of existing spatial information in one location,²¹⁵ in order to

²⁰⁸ Natural Resources Commission, *Final report Advice on finalising Draft Private Native Forestry Codes of Practice*, March 2022, available at <https://www.nrc.nsw.gov.au/pnf/koala>

²⁰⁹ See <https://www.epa.nsw.gov.au/your-environment/native-forestry/mapping-research/koala-mapping-program>

²¹⁰ The Koala Browse Tree Prescriptions spatial data set mapping is available to view at https://mapprod2.environment.nsw.gov.au/arcgis/rest/services/IFOA/Coastal_IFOA_ESA/FeatureServer/7

²¹¹ See, for example, cl 186 of the Integrated Forestry Operations Approval for BrigalowNandewar Region <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestagreements/integrated-forestry-operations-approval-brigalow-nandewar-region-including-amends1-3.pdf?la=en&hash=716C6FE7FF520A68DA9CE0CEB4C81CD04F66C19D>

²¹² NSW Department of Planning, Industry and Environment, *Framework for the spatial prioritisation of koala conservation actions in NSW*, 2020, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/framework-spatial-prioritisation-koala-conservation-190045.pdf>

²¹³ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/saving-our-species-program#:~:text=Saving%20our%20Species%20%28SoS%29%20is%20one%20of%20the,the%20future%20of%20Australia%20%99s%20unique%20plants%20and%20animals.>

²¹⁴ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/nsw-koala-strategy#:~:text=NSW%20Koala%20Strategy%20%20Towards%20doubling%20koalas%20by,...%203%20Delivering%20targeted%20action%20and%20investment%20>

²¹⁵ The Koala Habitat Information Base comprises several layers of existing spatial information, including:

- Koala Habitat Suitability Model (KHSM) – the probability of finding koala habitat at any location



provide the best available scientific information to support decision makers, rehabilitators, land managers and community members involved in koala conservation.²¹⁶

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- Koala Tree Suitability Index (KTSI) – the probability of finding a tree species that koalas are known to use for food or shelter
 - Koala Likelihood Map (KLM) including a confidence layer – predicts the likelihood of finding a koala at a location
 - Areas of Regional Koala Significance (ARKS) – identifies key koala populations and management areas with potential for long-term viability as well as priority threats to key koala populations.
 - Native vegetation of NSW – this is a high-resolution model of native tree cover and water bodies
 - All koala sightings recorded in NSW Bionet

²¹⁶ See <https://datasets.seed.nsw.gov.au/dataset/koala-habitat-information-base>

