



# MIDROC

Mid North Coast Regional Organisation of Councils

22 August 2012

Native Vegetation Regulation Review  
Office of Environment and Heritage  
Level 12, PO Box A290  
Sydney South NSW 1232

Dear Sir/Madam

**Review of the Native Vegetation Regulation: Private Native Forestry and Koalas**

Please find attached a submission to the Review of the Native Vegetation Regulation: Private Native Forestry and Koalas Discussion Paper on behalf of the Mid North Coast Regional Organisation of Councils.

We would be happy to discuss this submission further or provide additional information or clarification if required.

Our contact in relation to this matter is Mr Matthew Rogers, Director Development & Environmental Services, Port Macquarie-Hastings Council ☎ 02 6581 8531.

Yours sincerely

Tony Hayward  
General Manager



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### **MIDROC Submission to the Review of the Native Vegetation Regulation: Private Native Forestry and Koalas**

The Mid North Coast Regional Organisation of Councils (previously MIDGOC) submitted a letter of concern to the NSW Government over the implementation of the PNF Code, in relation to SEPP 44, dated 29 July 2011. The response from the Minister for the Environment, Robyn Parker MP, was that those issues would be considered in the amendments to the PNF code issued during the review of the Native Vegetation Regulations this year.

Coffs Harbour City Council has also been working directly with PNF Staff on amending the PNF code (attached) and as part of this process an assurance was given that this was to inform the OEH Private Native Forestry and Koalas Discussion Paper.

Unfortunately, the recent PNF workshops conducted by the EPA confirmed that the Discussion Paper issued on the subject makes no reference to these recommendations and prior negotiated draft PNF changes. Therefore, the Mid North Coast Regional Organisation of Councils (MIDROC) provide the following information and recommendations to the EPA.

#### **Policy Context – Koalas and PNF**

##### *Environment Protection and Biodiversity Conservation Act 1999*

Koala populations in Queensland, New South Wales and the Australian Capital Territory have recently been listed as vulnerable under the EPBC Act. This listing came into legal effect on 2 May 2012.

In accordance with the interim guidelines for referral, significant impacts determined by the EPBC Act include:

- the loss, fragmentation or permanent degradation of habitat critical to the survival or recovery of the listed species,
- the permanent fragmentation of an important population (e.g. through proposed actions such as power lines and easements, and main road developments)
- the clearing or burning of habitat where an important population (see above) is known or suspected to occur, or
- the removal of primary food trees to the extent where an important population declines.

(DSEWPac, 2012)

Recent listing of Koalas under the EPBC Act will require landholders and government agencies to ensure a recovery of koala numbers in nationally significant populations. In coastal NSW, the three areas where nationally significant populations are likely to be declared include Port Macquarie, Coffs Harbour and Port Stephens (S Phillips, *pers comms*, 2012).

The EPBC listing provisions will go further than SEPP44, requiring the protection and recovery of significant populations of koalas - based on recognition of core koala habitat as per SEPP44; the peripheral potential koala habitat; and the corridors connecting sub cells within significant populations. Advice sought from DSEWPac staff has confirmed that PNF activity carried out after the declaration on 2 May 2012 (that was not subject to an initial assessment under the EPBC Act at the time of being issued), may be subject to the EPBC Act.



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### *National Koala Conservation and Management Strategy (NKCMS) 2009-2014.*

The NKCMS was jointly developed by state and federal governments with the principle objective to 'conserve koalas by retaining viable populations in the wild throughout their natural range' (NRMMC, 2009). The NKCMS aims at mobilising coordinated action by the Australian Government, state and territory governments, local governments, local conservation groups, the rural community, wildlife carers and researchers everywhere. To this end, flow charts on page 6 clearly detail the direct relationship between the NKCMS, state planning legislation and guidelines and local government.

MIDROC is of the opinion that the following actions of the NKCMS must be aligned and adhered to by the PNF code:

1. Koala populations in identified priority areas are stabilised or increasing.
6. Greater area of high-quality koala habitat conserved and effectively managed through legislation, covenants or agreements.
7. Greater activity by land and resource managers to effectively protect and manage koala populations.
9. Productive and integrated partnerships that foster the conservation and welfare of koalas.

The NKCMS identifies the loss of habitat (including fragmentation and degradation) as the major threat to koalas and the primary factor responsible for declining populations in NSW and QLD (NRMMC, 2009). To this end the Federal Strategy clearly states "Under the strategy it is a high priority to identify important habitat areas and protect them from clearing".

### *NSW Threatened Species Conservation Act*

In New South Wales the koala is listed as vulnerable under the *Threatened Species Conservation Act 1995*, from which the NSW recovery plan was produced in 2008 (DECC 2008)

The recovery plan outlines actions necessary to aid the recovery of koala populations and provides a framework for local koala recovery efforts throughout the state. This plan is consistent with the NKCMS.

The loss and degradation of habitat is the most significant threat facing NSW koala populations and thus is listed as a key threatening process under the *Threatened Species Act*. The NSW Recovery Plan identifies logging as a key factor to the loss of habitat particularly on the north coast. It refers to the PNF PVP as the policy tool introduced to ensure that environmental outcomes are *improved or maintained* as required by the *Native Vegetation Act 2003*.

### *Native Vegetation Act 2003*

The management of private native vegetation in NSW is controlled through provisions of the *Native Vegetation Act 2003*, from which PNF operations are exempt - providing they adhere to the PNF code. The aims of the Act (which should be reflected in the intent of the PNF code) include:

- (a) to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State, and



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- (b) to prevent broadscale clearing unless it improves or maintains environmental outcomes, and
- (c) to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation, and
- (d) to improve the condition of existing native vegetation, particularly where it has high conservation value, and
- (e) to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation, in accordance with the principles of ecologically sustainable development.

By definition core koala habitat would be considered as native vegetation of high conservation value.

## *Environmental Planning and Assessment Act 1979*

State Environmental Planning Policy 44 (SEPP 44) operates within the legislative framework of the EP&A Act. The aim of SEPP 44 is 'to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range and reverse the current trend of koala population decline:

- (a) by requiring the preparation of plans of management before development consent can be granted in relation to areas of core koala habitat; and
- (b) by encouraging the identification of areas of core koala habitat; and
- (c) by encouraging the inclusion of areas of core koala habitat in environment protection zones'.

The above policy context summary clearly indicates that at all levels of the government there is a legal imperative and intent to:

- Work within the principles of ESD, which includes the precautionary principle
- Protect, maintain and improve areas of significant koala habitat
- Mitigate against key threatening processes
- Ensure that there is a productive, integrated and coordinated legislative response to the conservation of Koalas

## **Current situation and application of the PNF Code**

Firstly, MIDROC believes that the current interpretation of PNF (ie. logging can still occur in core koala habitat providing that there are no contemporaneous records) is a misinterpretation of the legislation and intent outlined in the PNF Code. This belief is based on 2 independent sources of legal advice (attached).

Notwithstanding this fundamental disagreement on legal interpretation of the current code, administration of the PNF code is contrary to above legal imperatives and intent in the following grounds:

1. Reliance on contemporaneous records as a means of providing adequate protection for core koala habitat areas is flawed because such records are not the result of unbiased, systematic survey effort. Koala occupation rates in core koala habitat areas range from anywhere between 8 and 50% (S Phillips, *pers comms*), the extent of which is largely



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determined by issues such as soil fertility, the density and size of preferred food trees, and the extent of historical disturbance. Thus, the singular reliance on contemporaneous records severely misinforms both the approval process and the impact that PNF logging is having on areas of core koala habitat.

2. PNF PVP licences are effectively self-regulated, the current view of the PNF staff 'that the risk based approach to compliance is effective in preventing illegal behaviour' cannot be demonstrated and does not translate to on-ground experiences.
3. It is understood that compliance checks are rarely undertaken during the actual harvest period, when the monitoring of the industry is required to comply with contemporaneous records. Under this interpretation of the PNF code, the EPA have no surety that Koalas and their habitat are being adequately protected.
4. The current interpretation of the PNF code where logging activities are allowed in core koala habitat, assuming there are no contemporaneous records, provides a clear economic incentive for a self regulating industry to remove/log koala habitat or similarly misinterpret scars and other markings as evidence of recent koala activity, immediately prior to logging.
5. Recent field work associated with Koala habitat mapping in the Bega, Eurobodalla, Kempsey and Port Macquarie Hastings LGAs can now demonstrate a decline of koala populations and occupancy rates in areas subjected to timber harvesting activities, strongly suggesting the need for a precautionary approach to the way PNF approvals and operations are undertaken.
6. The PNF code and suggested amendment options fails to integrate with the recent EPBC Act provisions.

## Recent developments

Koala habitat mapping has been completed, or is currently underway, for part or all of many north coast LGAs, including Tweed, Byron, Lismore, Coffs Harbour, Kempsey, Port Macquarie and Port Stephens. This mapping is predominately based on a standardised approach (Phillips & Callaghan 2011) which uses a robust and repeatable methodology.

Amongst other things, outcomes of this mapping include models illustrating distribution and extent of contemporary (i.e. current koala generation) core koala habitat areas, areas of long-term generational persistence, habitat classifications ranked in terms of koala carrying capacity, and area-specific lists of preferred food trees.

## Submission

Based on the above issues the following amendments of the Code and the Native Vegetation Act Regulations are put forward:

1. Koala protection provisions to be amended to ensure that there is unequivocal provision for the outright protection of the Koalas as to read:



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*Logging is prohibited in any Core Koala Habitat areas identified under the auspices of an approved Comprehensive Koala Plan of Management prepared in accord with SEPP 44 methodology, and/or within areas identified as supporting an important population for purposes of the EPBC Act.*

2. To address the issue of the current spatial scale of Koala Habitat Mapping and the fact that Koala Habitat areas are consistently responding to natural and human pressures the following provision apply:

*An applicant has the ability to engage a certified ecologist or PNF staff to undertake refined koala habitat mapping at a property scale. Koala habitat mapping is to follow the standard methods now embedded in CKPoMs (such as that recently approved for part of the Lismore LGA). All records are to be supplied to EPA and the local council.*

Certification would be in the form of competency recognition or accreditation to apply and interpret the SAT methodology of Phillips and Callaghan (2011)

3. A condition be placed on all PNF licence holders to allow access to land for government staff or their contractors who are undertaking koala habitat monitoring for the purposes of KPoMs or recovery planning under the EPBC Act.
4. Part 5 Clause 22 (4) of the draft Native Vegetation Act Regulations 2012 should include core koala habitat and significant populations as defined by SEPP 44 and the EPBC Act respectively in the definition of critical environmental area.

In addition to the above, it is strongly suggested that PNF staff should immediately cease the issuing of PNF licences over areas identified as Core Koala Habitat, particularly over significant populations as per the EPBC Act.

It is also requested that a second engagement processed be undertaken with all north coast councils and the LGSA prior to the final amendment of the PNF Code.

### References

DECC, (2008), *NSW Koala Recovery Plan 2008*, DECC

DSEWPaC, (2012), *Interim koala referral advice for proponents*, June 2012

NRMMC, (2009), *National Koala Conservation and Management Strategy 2009-2014*, DEWHA, Canberra

Phillips, S., and Callaghan, J., (2011), *The Spot Assessment Technique: a tool for determining localised levels of habitat use by Koalas Phascolarctos cinereus*. Australian Zoologist 35 (3). Pp 774-780

Phillips, S., (pers comms), *personal communication*, July 2012.

Taylor Lindsay Lawyers(unpublished) *legal advice to Port Macquarie Hastings Council*.

MID NORTH COAST GROUP OF COUNCILS  
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29 July 2011

The Hon. Robyn Parker MP  
NSW Minister for Environment  
Level 32, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

E: office@parker.minister.nsw.gov.au

Dear Minister,

**RE: Interaction of the Private Native Forestry Code of Practice and Forested Lands Identified as 'Core Koala Habitat'**

On the 2 June 2011 the Office of Environment and Heritage (OEH) convened a Local Council Koala Forum to allow discussion and networking in relation to the preparation and implementation of Comprehensive Koala Plans of Management (CKPoM) under State Environmental Planning Policy No. 44 - Koala Habitat Protection (SEPP 44). Present at the forum were representatives from the Department of Planning and Infrastructure (DoPI), officers from seven (7) local councils on the North Coast and koala ecologist Dr Steve Phillips.

Currently two (2) Councils, Coffs Harbour City Council and Kempsey Shire Council have approved CKPoM under SEPP 44, while five (5) other councils have plans in various stages of preparation. Councils invest significant resources in preparing a CKPoM with the aim of providing protection and management of koalas and their habitat within their local government area (LGA). Development of a CKPoM is strongly advocated both in the State Koala Recovery Plan (DECC 2008) under Action 1.13 and under the Northern Rivers Regional Biodiversity Management Plan (DECCW 2011) under Action 3.1.4 which states:

*Encourage local councils to prepare shire-wide or part shire-wide comprehensive Koala plans of management under the provisions of State Environmental Planning Policy No.44 - Koala Habitat Protection, to provide for the protection and management of Koalas and their habitat in the Region.*

With respect to Private Native Forest (PNF) operations, legal advice obtained by one of the represented councils states that the species prescriptions contained within the PNF Code for the koala (see clause (a)) creates a prohibition to forestry operations within areas identified as "core koala habitat" without exception. That is, forest operations cannot be approved under a PNF Property Vegetation Plan in "core koala habitat".

Despite this advice the OEH have issued a number of PNF Property Vegetation Plan approvals over areas mapped as "core koala habitat" within the Coffs Harbour LGA. OEH staff have justified this position based on the argument that a koala sighting needs to be contemporaneous. That is, a field survey is done immediately prior to commencement of forest operations by the landholder and where no koala evidence is found no further action is

required. This is an unsound ecological approach to the identification of koala habitat, given that koalas are mobile species and have large home ranges. Scientific evidence presented at the forum by Dr Steve Phillips demonstrated that koalas generally occupy less than 50 percent of their preferred habitat at any one time.

The appropriate scientific interpretation is to relate site evidence to areas of habitat identified as "core koala habitat" within the meaning of SEPP 44. These areas have been identified through a scientifically robust and approved methodology.

Further, a review of the objects of the *Native Vegetation Act* assists in interpreting the statutory aims and outcomes of operations approved under the Private Native Forestry Code of Practice. In line with the objectives of the *Native Vegetation Act* and the aims of the State Koala Recovery Plan it is considered highly inappropriate to koala conservation and recovery to permit forestry in areas of "core koala habitat".

This anomaly within OEH's policy and implementation of the PNF Code of Practice is inconsistent with the statutory responsibility of local government to implement SEPP 44 under the *Environmental Planning and Assessment Act 1979*.

The Mid North Coast Group of Councils have a significant interest in the preparation and implementation of CKPoM in accordance with SEPP 44. Accordingly, the Mid North Coast Group of Councils seek an immediate policy commitment from the Minister for the Environment that OEH will implement the koala prescriptions within the PNF Code of Practice in accordance with the objectives of the *Native Vegetation Act* and the aims of SEPP 44.

Should you wish to discuss this matter further, please contact Mr Matthew Rogers, on telephone 658718 531 or email [Matt.Rogers@pmhc.nsw.gov.au](mailto:Matt.Rogers@pmhc.nsw.gov.au).

Yours sincerely

  
Neil Potter  
for MIDGOC



Our Ref: JEH:203471

4 April 2011

The General Manager  
Coffs Harbour Council

Attention: Jeff Green

Dear Sir

**Legal Advice - Private Native Forestry Approvals and  
CHCC Koala Plan of Management (KPOM)**

You have sought our further advice following our letter of 23 February 2011 in relation to clarification of some issues. In that letter we answer several specific questions asked by Council.

**Request**

You have asked us to advise on the following matters and the position taken by DECCW;

1. We note that Council advise that:
  - DECCW is holding to their position that they are under no obligation to consider the Coffs Harbour Koala Plan of Management (CHKPOM) in relation to the PNF Code, Koala Prescription A as the CHPOM is not valid under SEPP 44.
  - DECCW further argues that even if the CHPOM was valid or when it is made valid, it would only be relevant if, pursuant to the Codes Appendix "there is a known record or site evidence of a threatened species".
  - A known record is sighting or record of the species in the New South Wales Wildlife Atlas. According to DECCW site evidence is contemporaneous evidence of faecal pellets around trees. The New South Wales Wildlife Atlas records of Koalas are concentrated around urban areas, and are relatively sparse in rural areas due to general reluctance of rural landholders to report Koalas and due to the large size of such properties etc. However, it is the rural areas that contain most core Koala habitats.
  - DECCW has expressed that even if the current or advised CHPOM is listed under the SEPP 44 and is caught by prescription A under the Code, logging may still be approved in core koala habitats except within 500 metres of a record of a Koala or a recently identified Koala faecal pellets (Koala pellets are readily dissolved by rainfall and Koalas roam extended areas of core Koala habitat).
  - The above position that DECCW has expressed give little practical protection to core Koala habitat that is identified under the CHPOM now or in the future.
2. The effect of section 29(2) of the Native Vegetation Act (NV Act) and clause 29(B) of the Native Vegetation Regulations (NV Regulations).

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3. Whether the granting of a private native forestry approval of land that does not require development consent constitutes an activity for the purposes of Part 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and if so the implications.

#### Applicability of the Code

#### How does the Private Native Forestry Property Vegetation Plan (PNVP) process work?

1. The PNFPVP process is governed or controlled by the NV Act, The NV Regulations and the Private Native Forestry Code (PNF Code).
2. The NV Act provides that native vegetation must not be cleared except in accordance with a development consent granted in accordance with the NV Act, or a property vegetation plan (PVP) (s 12 NV Act).
3. "Native vegetation" is defined as "any of the following types of Indigenous vegetation:
  - (a) trees (including any sapling or shrub, or any scrub),
  - (b) understorey plants,
  - (c) groundcover (being any type of herbaceous vegetation),
  - (d) plants occurring in a wetland," (s 6(1) NV Act)

The definition excludes marine vegetation to which the *Fisheries Management Act 1994* applies.

4. A landholder may submit a draft PVP to the Director General for approval by the Minister (s 26(1) NVA) (our emphasis). It is important to note that a landholder *does not have to* submit a PVP (our emphasis). If a PVP is not submitted, there are other means of obtaining consent for activities affecting native vegetation, such as under Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).
5. In determining whether to approve a PVP, the minister is to have regard to:
  - any relevant provisions of catchment action plans of catchment management authorities; and
  - matters required by the regulations. (s 27(2) NV Act)
6. The NV Regulation only refers to additional conditions for consent to be granted if an application is made for broad scale clearing, which is a more limited category than clearing of native vegetation.
7. "Broad scale clearing of native vegetation" is defined in the NV Act as "the clearing of any remnant native vegetation or protected regrowth" (s 8 NVA).
8. "Clearing native vegetation" is defined as "any one or more of the following:
  - (a) cutting down, felling, thinning, logging or removing native vegetation,
  - (b) - killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation." (s 7 NVA).
9. The NV Act contains in s 29 the requirement that the Minister is not to approve PVPs for broad scale clearing unless the clearing will improve or maintain environmental outcomes. There is a built in provision in the Regulations, Section 29B(1) states that clearing will improve or maintain environmental outcomes if a certain thing is done. It provides

*"broad scale clearing for the purposes of private native forestry, is for the purposes of the Act, taken to be clearing that will improve or maintain environmental outcomes if it is carried out in accordance with the PNF Code of Practice."*

10. Thus, the Minister fulfils his obligation under Section 29(2) of the NV Act if he requires private native forestry to be undertaken in accordance with the PNF Code of Practice.

11. Regulation 29B(2) provides the mechanism for doing that. It states that the Minister is not to grant an application for a PNFPVP unless the PVP does two things:

- (a) *adopts the PNF Code of Practice; and*
- (b) *provides for the clearing to be carried out in accordance with the PNF Code of Practice.*

12. We have reviewed the PNFPVPs that you have provided to us and note they contain the following words:

*This PVP adopts the Private Native Forestry Code of Practice (PNF Code of Practice) being the document that makes provisions for the clearing of native vegetation for the purpose of private native forestry that has been approved by the Minister for Climate Change and the Environment in accordance with clause 29A of the Native Vegetation Regulation 2005 and in force and published in the gazette on 8 February 2008.*

*The landholder is authorised to undertake private native forestry activities on the land identified as PNFPVP as shown on Schedule 1. The landholder must carry out any private native forestry activities authorised by the PVP in accordance with the PNF Code of Practice. (our emphasis)*

13. By incorporating these words the Minister satisfies clause 29B of the NV Regulations and it follows his obligation under clause 29 of the NV Act. The ordinary dictionary meaning of the word "adopt" is defined to mean "to make one's own, adopt a name or idea, to assume"
14. Effectively, the legislative framework set up by the NVA and the NVA Regulation incorporates the Private Native Forestry Code of Practice into the PNFPVP. That is that document becomes a part of the PNFPVP. The owner of the PNFPVP is then obliged to comply with the PNF Code; the Minister ensures compliance by mandating it.

#### Interpretation of the PNF Code of Practice

15. The PNF Code restates the requirement that broad scale clearing for the purpose of native forestry improves or maintains environmental outcomes if:

- It complies with the requirements of this Code; and
- any area cleared in accordance with the Code is allowed to regenerate and is not subsequently cleared, except where otherwise permitted by the Code.

Clause 1 of the Code requires as follows:

- 1. that before any forestry operations commence on private land a property vegetation plan (PVP) under the NV Act must be approved by the Minister for Climate Change, Environment and Water;
- 2. forest operations under an approved PVP must be conducted in accordance with all provisions of this Code.

"Forest operations" is defined in the code as meaning *"All clearing resulting from activities associated with forest management including harvesting operations, construction and maintenance of roads and tracks and prescribed burning operations."*

16. Clause 2.1 provides:

- (1) *a Forest Operation Plan must be prepared before forest operations commence;*
- (2) *a Forest Operation Plan must be in an approved form and consistent with the provisions of this Code and the requirements of the listed species ecological prescription for northern New South Wales forest which are set out in the appendix to this Code.*

17. It appears to us from the reading of Clause 2 of the PNF Code regarding forest operations planning and management that the Forest Operation Plan is prepared after the PNFPVP is granted to the landowner. It is almost like a condition of the PNFPVP. There is no requirement that anything is done with the Forest Operation Plan other than it must be read and signed and dated by the landowner and anyone else carrying out forest operations. It may be amended at any time and must be provided to an authorised officer of the Department of Environment and Climate Change if requested to do so.

18. Clause 2.15 provides, inter alia, that a Forest Operation Plan must contain the following:

- (a) *a map or maps showing ...*  
  - (ii) *recorded locations of any populations or endangered ecological communities listed under the schedules of the Threatened Species Conservation Act 1995 and species in the Listed Species Ecological Prescription for Northern New South Wales Forests which are set out in the Appendix to the Code.*

19. Clause 2.15 states that "recorded locations" be mapped, this term is not defined and we query whether this is read down by the reference in the introduction to the Listed Species Ecological Prescription for Northern New South Wales Forests Appendix.

20. Clause 4.2 of the PNF Code relates to protection of habitat and diversity. Of relevance to koalas is clause 4.2 that requires:

1. *that habitat trees must be retained in accordance with Table D;*
2. *Hollow bearing trees, recruitment trees, food resource trees, roost trees and nest trees are defined as habitat trees retained for the purposes of this Code.*

21. Table D contains the minimum standards for tree retention. It appears that the only relevant part of this table is in relation to feed trees where it states that *"a minimum of 6 feed trees per 2 hectares should be retained where available"*. Feed trees are defined in Table E and include several species that are feed trees for the Koala.

These trees then become "protected trees" as defined in clause 4.3(3). Clause 4.3 requires that:

1. *as far as practicable forestry operations must not damage protected trees; and*

#### The prescriptions

22. The only reference to the Listed Species Ecological Prescription Appendix occurs in Part 2 of the PNF Code.

The Appendix in the PNF Code relating to Listed Species Ecological Prescription contains an Introduction although it is not the prescription itself. The Introduction states:

*That these prescriptions must be applied within the forest operations area where there is a known record or site evidence of a threatened species.*

A "known record" is a sighting or record of the species in the New South Wales Wildlife Atlas available at [www.wildlifeatlas.nationalparks.nsw.gov.au](http://www.wildlifeatlas.nationalparks.nsw.gov.au).

"Site evidence" is a sign a species has visited or regularly uses a site, and includes observations of for example faecal pellets or scats, chewed seed cones or a nest, or evidence that the site has been used as a latrine.

We are of the view that site evidence would also properly include observation of a species.

DECCW argues that the sightings are to be contemporaneous. We are not sure what this means however we assume they mean that a field survey is done immediately prior to commencement of forest operations. This would appear to be an absurd result given that Koalas are mobile and can travel within their habitat. The more correct interpretation would be that it relates to site evidence over time.

23. The work that the prescriptions do is to assist in the protection of threatened species by providing certain protective measures. These include:

*Prohibition of forestry operations, exclusion zones, buffer zones and tree retention around locations of threatened species records.*

The PNF Code requires in the introduction that these exclusion zones and buffer zones requiring additional tree retention are to be included in the Forest Operation Plan.

24. The prescription for the Koala reads differently to the majority of the other prescriptions in the PNF Code. Many of the prescriptions read, for example, in the following manner

*Where there is a record of (the threatened species) within the area of forest operations, the following must apply:*

*[There are then listed various (a), (b), (c), (d) etc]*

The koala prescription has no such introduction and has three clauses (a), (b) and (c). The first paragraph (a) states:

*Forest operations are not permitted within any area identified as core koala habitat within the meaning of State Environmental Planning Policy No 44 – Koala habitat protection.*

Clause (a) in our view creates a prohibition to forestry operations without exception. That is, if forest operations are proposed in such an area, they are not permitted per se in core koala habitat.

Clause (b) (which has special requirements for koala management area 5 in the central and southern tablelands where koala populations are sparse), requires:

*Any tree containing a koala, or any tree beneath which 20 or more koala faecal pellets (scats) are found must be retained, and an exclusion zone of 20 metres must be implemented around each retained tree.*

In our view, this would apply to areas other than core koala habitats as outlined in clause (a).

Clause (c) states that:

*Where there is a record of a koala within an area of forest operations or within 500 metres of a forest operation of a koala faecal pellet (scat) is found beneath the canopy of any primary or secondary koala tree (set out in Table 1 below) the following must apply.*

1. *A minimum of 10 primary koala food trees and 5 secondary koala food trees must be retained per hectare of net harvesting area (not including other exclusions or buffer zones) where available;*
  2. *these trees should preferably be spread evenly across the net harvesting area, have leafy broad crowns and be a range of size classes with a minimum of 30 centimetre diameter at breast height over bark;*
  3. *Damage to retained trees must be minimised by directional or felling techniques;*
  4. *Post harvest burns must minimise damage to the trunks and foliage of retained trees.*
25. We disagree with DECCW's expressed opinion that even if the current CHKPOM is caught by Prescription (a) under the PNFCODE logging may still be approved in core koala habitats within 500 metres of a record of a koala or a recently identified koala scat. We disagree with this interpretation because we are of the view that if prescription (a) applies, forest operations are not permitted within that area. It is more than an exclusion zone, it is a prohibited zone. Therefore it follows that if forest operations are not permitted clause (b) and (c) of the Koala Prescription have no work to do.

While each of (a), (b) and (c) in the Prescriptions may apply to the total area of forest operations, if Prescription (a) applies, (b) and (c) will not need to be applied to that area. Part (b) and (c) may however be applied to areas outside of core koala habitat. This is clearly the way the instrument is to be read.

We have reviewed the PNF Code and can find no other prescription relating to a threatened species which effectively prohibits forestry operations within a certain area. The other prescriptions refer to exclusion areas. Thus it appears that the NV Act and its subordinate legislation obviously recognised the importance of mapping undertaken under SEPP 14, and the protection of core koala habitat.

26. Further it is our view that clause (a) of the Koala Prescription is a specific provision applying to threatened species which will prevail over a general provision such as that in the Introduction. That is the Forestry Operation Plan need to have regard to Koala prescription (a) regardless of the introduction. The operation of clause (a), does not rely on the location of scats or the sighting of a koalas in a tree, it relates to clearly mapped areas of Core koalas habitat, the mapping of which has been undertaken in accordance with SEPP 44.

#### **Compliance with the objectives of the Act**

27. Ambiguity within a statute or its subordinate legislation can be assisted by the objects of the statute.
28. The objectives of the NV Act are as follows:
- (a) *to provide for encourage and promote the management of native vegetation on a regional basis in the social economic and environmental interests of the State; and*
  - (b) *to prevent broad scale clearing unless it improves or maintains environmental outcomes; and*
  - (c) *to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation; and*

- (d) to improve the condition of existing native vegetation, particularly where it has high conservation value; and
- (e) to encourage the revegetation of land, and the rehabilitation of land with appropriate native vegetation in accordance with the principles of ecologically sustainable development these acts in particular a, b and c appear to promote environmental outcomes and environmental interests and biodiversity.

29. The *Interpretation Act* 1987 provides in clause 33 that regard can be had to the purpose or objects of the acts when interpreting the provisions of an act. That is, in the interpretation of a statutory rule, an interpretation consistent with the object of the act would be preferred to a construction that would not promote that purpose or object.

The NSW Court of Appeal has said that "Whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome of exercise of discretionary power." (*Minister for Urban Affairs and Planning v Rosemont Estate Pty Limited* unreported 90840127 14 August 1996).

It is our view that the objects of the NV Act assist the interpretation of the PNF Code as we see it, as it is clearly not in the environmental interests of the state to permit forestry in areas of core koala habitat.

There is no requirement in the Act from our review of it that requires the Minister to make decisions in accordance with the objectives of the Act. The closest that we come to this is clause 29 to which states that the Minister is not to approve a native property vegetation plan unless the clearing concerned will improve or maintain environmental outcomes. This is a direct application of objective (b) of clause 3 of the NV Act. As outlined above the satisfaction of this section is obtained by incorporating the PNF code into PVPs.

**Is core Koala habitat mapped under the CHKPOM, relevant to prescription (a) of the PNF Code?**

30. Yes.

SEPP 44 defines core koala habitat as "an area of land with a resident population of koalas, evidenced by attributes such as breeding females (that is females with young) and recent sightings of a historical record of a population."

The CHKPOM dated November 1999 was prepared according to the guidelines "Procedures for Preparing Comprehensive Koala Plans of Management under State Environmental Planning Policy No. 44 Koala Habitat Protection". In accordance with the aims and objectives of SEPP 44 the CHKPOM identifies ranks and maps koala habitat based on two independent methods, namely community based survey and field base survey. Both were analysed independently utilising the vegetation units mapped for Coffs Harbour City Council by Fisher et al 1996 (to enable production of a final map of various categories of koala habitat within the LGA<sup>1</sup>). Part 3 of the CHKPOM sets out the identification of koala habitat in Coffs Harbour. The koala habitat planning map forming part of the KPOM forms the basis for the identification of areas of core koala habitat meriting protection under the planning provisions of the LEP 2000. Clause 3.5 headed "Final Mapping of Koala Habitat" refers to the definition of core koala habitat in SEPP 44 and then states that the Koala Habitat Map (Map B7) was derived from results of a community survey combined with the results of the field based survey.

31. We note that there was a window of a month or so where Coffs Harbour Local Government Area was removed from Schedule 1 of SEPP 44 before its CHKPOM was approved by the Director.

<sup>1</sup> Clause 2.1 of the CHC KPOM.

It is clear from the documentation included in the CHPOM itself and also the document provided to us showing the chronological order of events relating to the preparation of the Koala Plan of Management that the plan was prepared in accordance with SEPP 44. It is also clear that the intention of the parties involved was that the Council was making its CHPOM under State Environmental Planning Policy No. 44. It was intended that once this plan was made it would supplant the need for SEPP 44 within Coffs Harbour area as the LEP would address these impacts.

Section 30 of the *Interpretation Act* 1987 provides "that the amendment or appeal of an Act or statutory rule does not affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule".

Preparation of the CHPOM was commenced under and prepared in accordance with SEPP 44 at the time when SEPP 44 applied to the Coffs Harbour area. It was approved by the Director and in accordance with clause 13 of SEPP44 and s30 of the *Interpretation Act* 1987 has effect.

32. It is our view, that the core koala habitat contained within the CHPOM is clearly core koala habitat that is identified within the meaning of State Environmental Planning Policy No. 44.

Although SEPP 44 does not now apply to Coffs Harbour the CHPOM was prepared and approved in accordance with State Environmental Planning Policy No. 44 Koala Habitat Protection and the core habitat identified within it is clearly an area "identified within that meaning" of SEPP 44.

We can go further and say that even if it was argued that the CHPOM was not validly made under SEPP44, a view we do not agree with, the core koala habitat identified in the CHPOM is still such as to fall within the meaning of core koala habitat. The words used are "within the meaning of" which should be given their ordinary meaning.

Is the Minister acting in accordance with the act?

33. By approving PNFPVP's on land that is core koala habitat, the Minister is not breaching the NV Act as the PVP's mandate compliance with the code and therefore clause (a) of the koala prescription. However it makes little sense that he issues such plans. We say this because the minister ostensibly grants an approval for forestry operation on land that he knows cannot be carried out. The risk of a non compliance or failure to properly apply the PVP PNF is high and should therefore be avoided by the Minister in not approving PVPs in areas of core Kola Habitat.

Does part 5 of the EP&A act apply?

34. No.

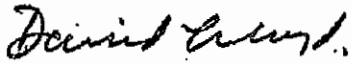
Section 16 of the NV Act states that Part 5 of the EPA Act does not apply to any clearing carried out in accordance with this Part and any such clearing is not an activity for the purposes of Part 5 of the EPA Act.

#### Conclusion

It is our view that prescription (a) of the PNF Code applies to areas of core koala habitat identified under the CHPOM. Therefore it follows that forestry operations are prohibited in such Core Koala Habitat. Clause (a) of the prescription is a specific provision that prevails over any general requirement in the introduction that there be a known record or site evidence of the species.



Yours sincerely  
HWL Ebsworth



David Lloyd QC



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## **Appendix:**

### **Listed species ecological prescriptions**

#### **Introduction**

These prescriptions must be applied within the forest operations area where there is a **known record** or **site evidence** of a threatened species, unless otherwise indicated by the particular prescription. A known record is a sighting or record of the species in the NSW Wildlife Atlas available at [www.wildlifeatlas.nationalparks.nsw.gov.au](http://www.wildlifeatlas.nationalparks.nsw.gov.au). Site evidence is a sign a species has visited or regularly uses a site, and includes observations of, for example, faecal pellets or scats, chewed seed cones or a nest, or evidence that the site has been used as a latrine.

A list of threatened species under the *Threatened Species Conservation Act 1995* and species profiles for each species can be viewed on the Department of Environment and Climate Change (DECC) website at [www.threatenedspecies.environment.nsw.gov.au](http://www.threatenedspecies.environment.nsw.gov.au).

The prescriptions set out below assist in the protection of threatened species, and include:

- (1) additional widths to stream exclusion zones
- (2) exclusion zones around locations of threatened species records
- (3) additional tree retention requirements around locations of threatened species records.

Exclusion zones and buffer zones requiring additional tree retention requirements must be applied within the Property Vegetation Plan (PVP) area subject to the Forest Operation Plan. Wildlife Atlas records that trigger these prescriptions are those less than 20 years old which have a reliability level of 1 to 5. Records in an adjoining protected area of public land (for example, in State Forests or National Parks) can be ignored if it can be demonstrated that the species has been protected and the conditions of the relevant Threatened Species Licence or Integrated Forestry Operation Agreement have been met.

Some species prescriptions vary according to the region in which they occur. Unless otherwise stated, the regions referred to in the prescriptions are based on the catchments administered by Catchment Management Authorities (CMAs) shown in Figure 1.

#### **Koala (*Phascolarctos cinereus*)**

##### **CMAs for application of prescription**

Border Rivers–Gwydir, Central West, Hawkesbury–Nepean, Hunter–Central Rivers, Namoi, Northern Rivers and Sydney Metro

**Note:** Koala populations are generally sparse or of low density in the South Coast, Central and Southern Tablelands and Western Koala Management Areas (Koala Management Areas 3, 5, 6 and 7; see Figure 4) and, as a result, scats are rarely encountered. Therefore, recording of any scat or a sighting of a koala in these areas should be considered significant.

##### **Prescription**

(a) Forest operations are not permitted within any area identified by a council as 'core koala habitat' under *State Environmental Planning Policy No. 44* –

*Koala Habitat Protection*, including via a plan of management made under the *State Environmental Planning Policy No. 44*. This prescription applies whether or not there is a known record or site evidence of a threatened species in the forest operations area.

For the purpose of this prescription, primary koala habitat identified in Parts A and B of the *Coffs Harbour City Koala Plan of Management* (dated November 1999) is taken to be 'core koala habitat' identified by a council under the *State Environmental Planning Policy No. 44 – Koala Habitat Protection*.

(b) Any tree containing a koala, or any tree beneath which 20 or more koala faecal pellets (scats) are found (or one or more koala faecal pellets in Koala Management Area 5) must be retained, and an exclusion zone of 20 metres (50 metres in Koala Management Area 5) must be implemented around each retained tree.

(c) Where:

(i) there is a record of a koala within an area of forest operations or within 500 metres of an area of forest operations; or

(ii) there is a koala faecal pellet (scat) found beneath the canopy of any primary or secondary koala food tree (see Table I below); or

(iii) forest operations are within an area identified as secondary koala habitat in Parts A or B of the *Coffs Harbour City Koala Plan of Management* (dated November 1999) (whether or not there is a known record or site evidence of a threatened species in that forest operations area)

the following must apply:

(i) A minimum of 10 primary koala food trees and 5 secondary koala food trees must be retained per hectare of net harvesting area (not including other exclusion or buffer zones), where available.

(ii) These trees should preferably be spread evenly across the net harvesting area, have leafy, broad crowns and be in a range of size classes with a minimum of 30 centimetres diameter at breast height over bark.

(iii) Damage to retained trees must be minimised by directional felling techniques.

(iv) Post-harvest burns must minimise damage to the trunks and foliage of retained trees.



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**Confidential**

15 December 2011

Our ref: HAS00311

The General Manager  
Port Macquarie-Hastings Council  
PO Box 84  
PORT MACQUARIE NSW 2444

Attention: Thor Aaso

**Email**

Dear Sir

**Advice re PNF and Koala Habitat**

**Introduction**

- 1 I refer to Thor Asso's email to me dated 10 October 2011.

**Background**

- 2 Council is currently undertaking mapping of koala habitat in its local government area pursuant to *State Environmental Planning Policy (Koala Habitat) 44 (SEPP 44)*.
- 3 Council's mapping is for the purpose of developing a comprehensive koala plan of management for the Council's local government area under SEPP 44.
- 4 Private native forestry (PNF) is defined in the *Native Vegetation Regulation 2005 (NV Regulation)* as 'the management of native vegetation on privately owned land for the purpose of obtaining, on a sustainable basis, timber products (including sawlogs, veneer logs, poles, girders, piles and pulp logs)'.
- 5 A property vegetation plan (PVP) for PNF under the *Native Vegetation Act 2003 (NV Act)* and the *Native Vegetation Regulation 2005 (NV Regulation)* is one of the ways a person can clear native vegetation on his or her land for the purpose of PNF.
- 6 Within the Council's local government area, there are currently 151 PNF PVPs in place for the harvesting of timber for the purposes of private native forestry.

**Advice requested**

- 7 Council requires advice on how the Council's koala habitat mapping will impact current and future PNF PVPs, in particular:

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- 7.1 whether the mapping of land as '*core koala habitat*' within the meaning of SEPP 44 means that logging of any description is prohibited on that land, based on the premise that the *Private Native Forestry Code of Practice (PNF Code)* is a legally binding instrument under the provisions of Part 5A of the NV Regulation (Question 1),
- 7.2 whether land that is mapped as *core koala habitat* as a result of Council's current study will retrospectively apply to existing PNF PVPs (Question 2),
- 7.3 whether it is correct to interpret the PNF Code as meaning that forestry operations can still take place on land mapped as *core koala habitat*, provided that there are no instantaneous records/sightings of koalas prior to the commencement of logging operations (Question 3),
- 7.4 whether the process of approval by the Minister of a koala plan of management under *State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP 44)* is the only way to legally define *core koala habitat* for the purposes of the PNF Code or whether *core koala habitat* can be defined for the purpose of the PNF Code via other means? (Question 4).

#### Summary of advice

- 8 In summary, my response to your questions is as set out below.

#### Question 1

- 9 It is a condition of the PNF PVP that operations be carried out in accordance with the PNF Code.
- 10 The PNF Code prevents forest operations on land mapped as *core koala habitat* under SEPP 44 if there is a *known record* or *site evidence* of koalas on that land.
- 11 Given the definition of *core koala habitat* in SEPP 44, it is highly likely that there would be a *known record* or *site evidence* of koalas on such land, and if so, forest operations will be prohibited on that land.

#### Question 2

- 12 Once a *known record* or *site evidence* of koalas is established in respect of land, clause 1(2) of the PNF Code would require forest operations to cease on that land, even if the PNF PVP was approved when there was no *known record* or *site evidence* of koalas.

#### Question 3

- 13 It is correct that if there is no *known record* or *site evidence* of koalas on land mapped as *core koala habitat* or any other part of a forest operations area, then forest operations will not be prevented.
- 14 However, as stated above, if the *known record* or *site evidence* is established after the commencement of forestry operations, the forestry operations will still be prevented.
- 15 Also, the *known record* or *site evidence* does not need to be 'instantaneous'.
- 16 For new forestry operations, a *known record* may exist even though there have been no recent sightings.

#### Question 4

- 17 Council does not need to adopt a koala plan of management under SEPP 44 in order to define *core koala habitat* for the purposes of the PNF Code. Provided that Council relies on information obtained from a person with appropriate qualifications and experience, evidencing that an area of land has a resident population of koalas, that area would be *core koala habitat* for the purposes of the PNF Code.

#### Legislative background

- 18 Under the NV Act, native vegetation must not be cleared (except in limited circumstances) except in accordance with:
- 18.1 a development consent granted in accordance with the NV Act, or
  - 18.2 a PVP (s12 of NV Act).
- 19 You have requested advice in relation to PVPs.
- 20 Part 4 of the NV Act deals with PVPs and provides at section 29 that a PVP which proposes 'broadscale clearing' (being clearing of any native vegetation that is not non-protected regrowth) is not to be approved unless the clearing concerned will improve or maintain environmental outcomes.
- 21 I assume the PVPs in question relate to broadscale clearing. If they are not, please let me know as the requirements below do not necessarily apply to private native forestry operations which involve clearing non-protected regrowth.
- 22 In relation to PVPs, the NV Act provides that:
- 22.1 PVPs require ministerial approval (s27),
  - 22.2 PVPs have effect for a maximum of 15 years (s30(1)),
  - 22.3 PVPs may be registered on the title to the land (s31), and
  - 22.4 clearing of native vegetation in accordance with a PVP cannot be prohibited, restricted or otherwise affected by a provision of any environmental planning instrument made after the approval of the PVP (s17).
- 23 Specifically in relation to PNF, broadscale clearing of native vegetation for the purposes of PNF is deemed to be clearing that improves or maintains environmental outcomes if it is carried out in accordance with the PNF Code (see cl29B of the NV Regulation).
- 24 In fact, clause 28B(2) of the NV Regulation prohibits the granting of approval to a PNF PVP unless it adopts the PNF Code and provides for the clearing to be carried out in accordance with the PNF Code.
- 25 It follows that all PNF PVPs in the Council's area have adopted the PNF Code and that clearing must therefore be carried out in accordance with the PNF Code.

#### Private Native Forestry Code of Practice for Northern NSW

- 26 The PNF Code is in four parts. I have assumed that the part titled '*Private Native Forestry Code of Practice for Northern NSW*' is the relevant PNF Code for the Council area. For the purposes of this advice, references to the PNF Code are references to the document titled '*Private Native Forestry Code of Practice for Northern NSW*'.
- 27 The PNF Code provides that:

- 27.1 'forest operations' under an approved PVP must be conducted in accordance with all provisions of the PNF Code (clause 1(2)),
- 27.2 'forest operations' is defined as 'all clearing resulting from activities associated with forest management including harvesting operations, construction and maintenance of roads and tracks, and prescribed burning for regeneration'.
- 27.3 a 'Forest Operation Plan' (FOP) must be prepared before forest operations commence (clause 2.1(1)),
- 27.4 a FOP must be in an approved form and consistent with the provisions of the PNF Code and the requirements of 'Listed Species Ecological Prescriptions for Northern NSW Forests', set out in the Appendix to the PNF Code (Appendix) (clause 2.1(2)),
- 27.5 a FOP must contain, amongst other things, a map showing the location and boundaries of the area in which harvesting and/or other forest operations will occur and show the recorded locations of any species listed in the Appendix (cl2.1(5)(i) and (ii)).
- 28 Koalas are listed in the Appendix.
- 29 The PNF Code provides that the prescriptions set out in the Appendix are for the purpose of 'assisting in the protection of threatened species', and include prescriptions for:
- 29.1 additional widths to stream exclusion zones,
- 29.2 exclusion zones around locations of threatened species records, and
- 29.3 additional tree retention requirements around locations of threatened species records.
- 30 The introduction to the Appendix provides:
- These prescriptions must be applied within the forest operations area where there is a known record or site evidence of a threatened species. A known record is a sighting or record of the species in the NSW Wildlife Atlas available at [www.wildlifeatlas.nationalparks.nsw.gov.au](http://www.wildlifeatlas.nationalparks.nsw.gov.au). Site evidence is a sign a species has visited or regularly uses a site, and includes observations of, for example, faecal pellets or scats, chewed seed cones or a nest, or evidence that the site has been used as a latrine.*
- 31 For koalas, the prescriptions in the Appendix include:
- (a) Forest operations are not permitted within any area identified as 'core koala habitat' within the meaning of State Environmental Planning Policy No. 44 – Koala Habitat Protection.
- (b) Any tree containing a koala, or any tree beneath which 20 or more koala faecal pellets (scats) are found (or one or more koala faecal pellets in Koala Management Area 5) must be retained, and an exclusion zone of 20 metres (50 metres in Koala Management Area 5) must be implemented around each retained tree
- 32 I have assumed that the Council is located in either catchment management authority area 1 or 2 (as shown in the map on p18 to the PNF Code) to which the prescriptions for koalas apply.
- 33 'Core koala habitat' is defined in SEPP 44 as 'an area of land with a resident population of koalas, evidenced by attributes such as breeding females (that is, females with young) and recent sightings of and historical records of a population'.

## Question 1 and Question 2

- 34 As advised above, the NV Regulation requires a PNF PVP to adopt and be in accordance with the PNF Code.
- 35 The prescription in the Appendix prohibiting forest operations in *core koala habitat* is triggered where the forest operations occur in an area where there is a *known record* or *site evidence* of koalas.
- 36 *Known record* and *site evidence* are defined in the Introduction to the Appendix (see above).
- 37 I am of the view that it would be highly likely that an area mapped as *core koala habitat* (evidenced for example by recent sightings of and historical records of a population) would have signs that koalas have visited or regularly use the area and therefore have *site evidence* of koalas.
- 38 However, it is possible that there could be areas mapped as *core koala habitat* where there is no *known record* or *site evidence* of koalas.
- 39 Therefore, it is not the case that there is an automatic prohibition of forest operations in mapped *core koala habitat*. The test would be whether there is a *known record* or *site evidence* of koalas as defined in the PNF Code.
- 40 Council has the opportunity of including its mapped *core koala habitat* in the NSW Wildlife Atlas by contacting the Wildlife Data Unit of the Office of Environment and Heritage. If the mapped *core koala habitat* is included in the Atlas, it would become a *known record*.
- 41 If the area to which a PNF PVP applies does have a *known record* or *site evidence* of koalas, then the PNF Code would operate to require, before forest operations commence, a FOP to be prepared consistent with the requirements of the prescriptions for koalas found in the Appendix.
- 42 Where forest operations have commenced pursuant to a PNF PVP and there is a FOP in place and subsequent information is obtained on a *known record* or *site evidence* of koalas, in my view clause 1(2) of the PNF Code and the Appendix would operate to restrict forest operations in *core koala habitat*.
- 43 I do not think that there is a valid argument that because FOPs are only required to be prepared *before* forest operations commence, those operations can continue even if a *known record* or *site evidence* of koalas is subsequently established, as the requirement in clause 1(2) of the PNF Code is not dependent on the terms of the FOP.
- 44 My view is supported by the fact that the 'Forest Operation Plan Guidelines – Private Native Forestry Code of Practice for Northern NSW' published by the then Department of Environment, Climate Change and Water states that:

*If you find site evidence of any listed species while forest operations are being carried out, you need to make sure the Code provisions to protect the listed species will be complied with.*
- 45 Additionally, the purpose for which the PNF Code must be complied with is to ensure that broadscale clearing proposed by a PNF PVP will improve or maintain environmental outcomes. Given that PVPs have effect for up to 15 years, in my view, it would not serve this purpose if updated information on threatened species cannot prevent further forest operations which could affect those species.



### Question 3

- 46 As advised above, the prescription in the Appendix prohibiting forest operations in *core koala habitat* is triggered where the forest operations occur in an area where there is a *known record* or *site evidence* of koalas.
- 47 If there is a *known record* or *site evidence* of koalas in the *core koala habitat* or any other part of a forest operations area, then the prescriptions relevant to koalas will apply to prevent all forest operations in the *core koala habitat* (within the meaning of the SEPP 44) within the forest operations area.
- 48 If there is no *known record* or *site evidence*, then the prescriptions will not apply.
- 49 Whilst it is technically possible for *core koala habitat* not to be based on a *known record* or *site evidence* (as defined in the Appendix), in almost all cases it will be, and therefore practically, forest operations will almost always be prohibited in *core koala habitat*.
- 50 Even if prior to commencing forest operations, there was no *known record* or *site evidence* of koalas in a *core koala habitat* or other part of a forest operations area, if there subsequently was any *known record* or *site evidence* of koalas in a forest operations area, then the prescriptions in the Appendix would be triggered to prohibit any further forest operations in the *core koala habitat* within the forest operations area.
- 51 Also the requirement for a *known record* or *site evidence* means that forestry operations could be prevented even if there were no recent sightings. The Appendix makes clear that a *known record* can include a record in the NSW Wildlife Atlas up to 20 years old.

### Question 4

- 52 I am of the view that Council does not need to adopt a koala plan of management under SEPP 44 in order to define *core koala habitat* for the purposes of the PNF Code.
- 53 *Core koala habitat* in the Appendix simply means *core koala habitat* within the meaning of SEPP 44.
- 54 SEPP 44 defines *core koala habitat* in cl4 to mean 'an area of land with a resident population of koalas, evidenced by attributes such as breeding females (that is, females with young) and recent sightings of and historical records of a population'.
- 55 Clause 8(2) of SEPP 44 requires Council to satisfy itself as to whether or not land is a *core koala habitat* only on information obtained by it from a person with appropriate qualifications and experience in biological science and fauna survey and management.
- 56 Therefore I am of the view that provided Council relies on information obtained from such a person that an area of land has a resident population of koalas, that area would be *core koala habitat* for the purposes of the PNF Code.
- 57 I trust the above is of assistance. Please do not hesitate to contact me if you have any questions.



Yours sincerely,

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