

17 February 2017

Director, Koala Strategy Submissions
PO Box A290
Sydney South NSW 1232
By email: koala.strategy@environment.nsw.gov.au
Our Ref: 1736

Dear Director,

Submission on developing a NSW Koala Strategy

Thank you for the opportunity to provide input on a whole-of-government Koala Strategy for NSW. We strongly support better agency coordination and protection of koalas through a range of regulatory, policy and incentive mechanisms.

EDO NSW is a community legal centre specialising in public interest environmental law. For over 30 years we have provided the NSW community with access to legal advice and other professional expertise relating to environmental and planning laws. We also have a dedicated Policy and Law Reform team that assists communities, groups and state and federal governments to improve environmental protection laws.

Given our expertise, this brief initial submission focuses on the essential role of biodiversity and planning laws in any Koala Strategy. Relevantly we note the broad recommendations 4 and 5 of the Chief Scientist & Engineer's *Review into the Decline of Koala Populations* (2016): 'That the Government improve outcomes for koalas through changes to the planning system'; and 'through the Biodiversity Conservation Bill [now the 2016 Act] and associated regulations'.

This submission addresses the following:

- 1. NSW needs laws that will protect the koala and its habitat from major threats**
- 2. Examples where planning laws and biodiversity protections are failing**
- 3. New biodiversity and land clearing laws**
- 4. Recent Submission on the Koala SEPP**
- 5. Review of threatened status and recovery plan: What is the risk of extinction?**

- 1. NSW needs laws that will protect the koala and its habitat from major threats**

We strongly support better integration between different agencies' operations, laws and policies, compliance oversight and industry regulation (particularly for rural land-clearing, public and private native forestry, roads, mining and urban development).

The future of NSW koalas will be heavily influenced by protections in these laws and policies:

- planning laws and instruments, and development assessment and approval processes under the *Environmental Planning and Assessment Act 1979* (**Planning Act**), particularly strategic planning and major project assessment;
- the future scope and effectiveness of the Koala SEPP (see **Attachment A**);
- environmental impact assessment (**EIA**), 'offset' methods, species listing and private land conservation under the *Biodiversity Conservation Act 2016*;
- rural land-clearing under the *Local Land Services Amendment Act 2016*, particularly future land-clearing codes, and the concerning possibility that the Act could commence before the Native Vegetation Regulatory Map is ready;
- the rigour of Integrated Forestry Operations Approvals (**IFOAs**) and the future conduct of native forestry under the *Forestry Act 2012* (see **Attachment B**);
- mining projects under the *Mining Act 1992* and *Petroleum Onshore Act 1991*;
- the rigour of EIA and approval processes for major road projects overseen by Roads and Maritime Services (**RMS**), and other infrastructure projects;
- management of public land under the *Crown Lands Management Act 2016* and the national parks estate under the *National Parks and Wildlife Act 1974*; and,
- assessment of potentially 'significant impacts' on Koala populations under the *Environment Protection & Biodiversity Conservation Act 1999* (Cth), where NSW koalas are also listed as Vulnerable (note: RMS now has a 'strategic assessment' to self-assess its own Part 5 projects).

While these laws are not all covered in detail here, we would be happy to provide further assistance in relation to improving how these laws protect koalas and habitat. On forestry, our recommendations on the Coastal IFOA review are at **Attachment B**.

2. Examples where planning laws and biodiversity protections are failing

The protection of koalas and other threatened species and ecological communities in NSW is hampered because planning laws tend to undermine biodiversity protections. We note the following four examples:

- At the strategic level, threatened species and koala habitat is not protected by upfront 'no go zones', other than for national parks. For example, there is no listed *critical habitat* for the koala (or 99% of other NSW threatened species).
- The Koala SEPP aims to protect koalas and their habitat, but its settings are weak and it is not targeted at the type or scale of projects with highest impact.
- Unlike ordinary development, major projects (State Significant Development and Infrastructure like mines and roads) do not require concurrent approval from environmental agencies for impacts on threatened species.

- Few if any projects are refused due to impacts on listed threatened species, with an increased reliance on the use of ‘biodiversity offsets’, for which there is limited evidence of its efficacy.

3. New biodiversity and land clearing laws

Unfortunately, reforms that will soon repeal the *Threatened Species Conservation Act 1995* and the *Native Vegetation Act 2003* do not address these problems, and may exacerbate them in other ways.¹ For example:

- The Local Land Services Act removes the prohibition on broadscale land-clearing, and prevents LLS officers from refusing code-compliant clearing. Codes can allow clearing hundreds of hectares, including threatened species and endangered ecological communities.
- The Biodiversity Assessment Method (a primary tool for EIA in future planning approvals) includes weak offsetting rules and ‘variations’. If a developer wants to clear koala habitat, they can pay into a Fund instead of finding offsets first.
- Major projects that cause ‘serious and irreversible impacts’ to koala populations could still be approved with planning authorities’ discretion.
- Regulations to protect against ‘serious and irreversible impacts’ are yet to be defined, but will be determined by the ‘opinion’ of the consent authority.²

Future *Biodiversity Conservation Act 2016* regulations must improve this situation. As our Koala SEPP submission notes (p 6):

*Importantly, once koala habitat has been identified, we **recommend** the [Planning Act] approval process must not allow important koala habitat to be offset, or cleared in exchange for money, in the way that the proposed Biodiversity Assessment Method (BAM) does.³*

Rather, to achieve the aims of stemming and reversing koala population decline, assessment and decision-making frameworks must protect in-tact habitat and resident populations (not offset them), and also protect areas to support shifting populations under climate change.

Regulations and land-clearing Codes under the *Local Land Services Amendment Act 2016* must also apply further safeguards. In particular:

- The Native Vegetation Regulatory Map (and preferably koala mapping) must be finalised before the new land-clearing system and Codes commence. Switching on the Codes before the Map is finalised will put LLS staff under pressure and put remnant habitat at higher risk of mistaken or illegal clearing.
- Regulations must require verification that code-based clearing proposals will not affect threatened ecological communities/species/habitat.

¹ EDO NSW submissions on the biodiversity and land management reforms are available at: http://www.edonsw.org.au/biodiversity_legislation_review.

² See Biodiversity Conservation Act 2016, s. 7.16; LLS Amendment Act 2016, s. 60ZF.

³ The BAM will underpin environmental impact assessment under the *Biodiversity Conservation Act 2016*. See EDO NSW, *Technical submission on the BAM and mapping method*; and *Submission on the Biodiversity Conservation Bill 2016*: www.edonsw.org.au/nsw_biodiversity_reform_package_2016.

- Codes should not apply to land that is likely koala habitat (not just ‘core’). Such land and activities should be subject to proper surveying and protection, including regulatory safeguards and eligibility for habitat restoration funding.
- The updated Koala SEPP must also apply to rural land-clearing proposals that exceed Code limits (to be assessed by a new Native Vegetation Panel), and for example, include a requirement that clearing would have to be consistent with a Koala Plan of Management.

4. Recent Submission on the Koala SEPP

We note that the Government is seeking comments to inform the Koala Strategy at the same time as its review of the state Koala Habitat Protection policy (**SEPP 44**). Our recent submission on SEPP 44 raises many issues relevant to the planning system, biodiversity laws and koala management – see **Attachment A**.

Part A of our Koala SEPP submission identifies seven additional issues relevant to the planning system that are not addressed in the SEPP review documentation. To inform the Strategy we direct your particular attention to item i), iii), iv), v) and vi):

- i) **Relationship between Koala SEPP and future NSW koala strategy**
- ii) Further information and analysis needed on the SEPP’s effectiveness
- iii) **Expanding the scope of development covered by the SEPP**
- iv) **Cumulative impacts and the ‘1 hectare limit’ on assessable projects**
- v) **Koala SEPP must be climate change ready**
- vi) **Monitoring, auditing and reporting**
- vii) Statutory review periods.

We also refer you to the following parts of our attached Koala SEPP submission: Application of the SEPP (p 5), Development Assessment (p 6), Guidelines and Plans of Management (pp 6-8), Local Planning Directions and Environmental Zoning (p 8).

5. Review of threatened status and recovery plan: What is the risk of extinction?

The NSW koala population is listed as Vulnerable under both state and federal laws (that is, at *high risk of extinction* in the *medium term*). Given the very significant decline of several key NSW koala populations, the NSW Scientific Committee should consider reassessing the koala’s threat status in NSW on a precautionary basis (i.e, Is the koala is facing a *very high risk* of extinction in NSW in the *near future*?)

While the development of the Strategy is a timely point to review the Koala’s status, it is unclear whether recognising a higher threat status would actually be possible under the new *Biodiversity Conservation Act 2016* (when it commences); or whether changes in this law, and the new federal-state ‘common assessment method’ for listing, mean the koala’s status will only be considered on a national basis in future.⁴

⁴ See for example, *Biodiversity Conservation Act 2016* (NSW), sections 4.4(4) and 4.14.

The federal list refers to the 'combined population in' NSW, QLD and the ACT. However, we consider that the koala's status should be assessable on a state basis, and that this would align with NSW community expectations.

Finally, the status of the NSW Koala Recovery Plan 2008 (and whether the Strategy replaces it) should be reviewed and clarified. Under the *Biodiversity Conservation Act 2016*, references to recovery plans will be repealed from threatened species law and the Planning Act (including requirements that authorities refer to recovery plans, and decisions don't contradict them⁵). Important outstanding questions include:

- Will the Koala Strategy replace the Recovery Plan?
- Will it become a 'strategy' under the new Biodiversity Conservation Program?
- How will NSW plans and strategies interact with the forthcoming federal Plan?

The fact that equivalent legislative references are not carried over is a problem for integrating koala recovery in the planning system. The Strategy should clarify this.

Conclusion

We hope this submission assists in progressing a whole-of-government Koala Strategy for NSW. We would be pleased to participate in future discussion forums.

If there are any matters you would like to discuss, please contact me or Rachel Walmsley, Policy & Law Reform Director, on (02) 9262 6989 or by e-mail.

Yours sincerely,
EDO NSW



Mr Nari Sahukar
Senior Policy & Law Reform Solicitor

⁵ For example, s. 69 of the Threatened Species Conservation Act; s. 112A of the EP&A Act 1979.

Attachment A: EDO NSW, Submission on the Review of the Koala SEPP (State Environmental Planning Policy 44 – Koala Habitat Protection), January 2017

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Available online at: http://www.edonsw.org.au/native_plants_animals_policy.

To inform the Koala Strategy's development we direct your particular attention to:

- **Part A** of that submission (issues not dealt with in the review), (pp 2-3) –
 - Item (i) *Relationship between Koala SEPP and NSW koala strategy*
 - Item (iii) *Expanding the scope of development covered by the SEPP*
 - Item (iv) *Cumulative impacts and 1 hectare limit on assessable projects*
 - Item (v) *Koala SEPP must be climate change ready*
 - Item (vi) *Monitoring, auditing and reporting.*

- **Part B** of that submission (operation of the Koala SEPP and amendments) –
 - *Application of the SEPP* (p 5)
 - *Development Assessment* (p 6)
 - *Guidelines and Plans of Management* (pp 6-8)
 - *Local Planning Directions and Environmental Zoning* (pp 8-9).

Attachment B: EDO NSW, Submission on the review of the Coastal IFOAs (April 2014) (recommendations)

Introductory

Recommendations:

- *The new IFOA should include ecologically sustainable forest management (ESFM) as its principal underlying objective. A further objective should be to maintain or improve environmental values and outcomes in State forests and other Crown timber lands.*
- *Issues of balancing wood supply with the need to maintain or improve environmental values should be the subject of a broader, independent expert review involving the NSW Natural Resources Commission (NRC), to report publicly in the near-term.*
- *The NRC should advise on the IFOA remake, before and after a draft IFOA is exhibited, to provide an arms-length appraisal of environmental effectiveness of any new IFOA, and input on associated protocols, guidelines and monitoring framework.*

Other key changes proposed in the Discussion Paper are addressed below.

Proposed coastal IFOA structure & framework (single IFOA, outcomes-based principles)

Recommendations:

- *The new IFOA must continue to protect regional environmental and heritage variations.*
- *EDO NSW supports clear and enforceable conditions, based on a mix of prescriptive and outcomes-based requirements.*
- *Outcomes-based conditions must be measurable and enforceable, with appropriate resources and agency culture; and must emphasise proactive prevention of damage.*
- *At the next consultation stage, the Government should release a comparison or translation of old and new IFOA licence requirements and environmental safeguards.*
- *FCNSW should be required to document its outcomes-based approach, publish its compliance policies (e.g. a compliance charter), and maintain a non-compliance register.*
- *The EPA should clarify the enforcement mechanisms and operation of forestry protocols, and ensure transparent procedures for any iterative amendments.*

Landscape-based measures and reduced surveys for threatened species

Recommendations:

- *Further information is needed on the extent to which a landscape-scale approach will replace targeted surveys for threatened species, and the processes involved.*
- *Landscape-based approaches should specifically address climate change risks, and cumulative impacts of forestry and surrounding land uses on biodiversity outcomes.*
- *The Government should examine a broader range of measures to improve survey methods based on experience, assisted by OEH, the NRC or independent ecologists.*
- *A precautionary approach must inform IFOA measures to protect threatened species.*
- *New processes should be developed to encourage communities to share their local ecological knowledge with regulators in order to enhance protection and outcomes.*
- *The Government should investigate how ecological survey data can be captured for publication, research and re-use within and outside government.*
- *The review of the Threatened Species Licence framework by the Forest Practices Authority of Tasmania should be conducted jointly with OEH or independent ecologists.*

Offences, penalties and enforcement reforms

Recommendations:

- *EDO NSW supports increased forestry penalties and enforcement tools. This must be accompanied by increased use of tools and prosecutions, and a 'culture of compliance'.*
- *The Government should consider a tiered enforcement system, as in NSW pollution law.*
- *The Forestry Act 2012 should be amended to include 'open standing' for third party enforcement of breaches.*
- *FCNSW and contractors should be jointly liable for breaches of forestry legislation, supported by minimum competency requirements for contractors.*

Streamlining licence contents

Recommendations:

- *Measures to better integrate and align licence conditions must adopt a 'highest common denominator' approach to protecting environmental values and outcomes.*
- *The NSW Government should consider alternatives to removing IFOA provisions on heritage protection (including Aboriginal heritage), grazing, weed and pest control.*
- *The Government should engage with Aboriginal groups on the proposal to remove Aboriginal heritage requirements from licenses and how to best ensure protection.*
- *Further information on proposals for grazing, weed and pest control is needed.*
- *If references to legal obligations under other Acts are removed from the new IFOA, FCNSW staff and contractors must be fully trained and educated on these requirements. The Forestry Act 2012 should also be amended to require greater regulator cooperation.*
- *Clarify and demonstrate how other forest uses will be regulated to avoid loopholes.*

Steep slope harvesting trial

Recommendations:

- *EDO NSW opposes the introduction of a steep slope harvesting trial.*
- *Before any trial is contemplated, a peer review should be undertaken, measures employed to mitigate environmental impacts, and independent assessments undertaken and made available to the public.*
- *Steep slope harvesting could be subject to a broader forestry review by the NRC.*

Mapping technology, surveying, ground-truthing & environmental monitoring

Recommendations:

- *The expanded IFOA monitoring framework must align with key principles of ESFM; and include measurable strategic and detailed environmental aims and outcomes.*
- *Forestry regulators and FCNSW should be required to report on:*
 - *fulfilment of updated and rigorous ESFM criteria and indicators*
 - *whether strategic environmental outcomes are being maintained or improved*
 - *whether detailed targets are being achieved*
 - *how adaptive management is being used to improve environmental outcomes.*
- *The Government should immediately publish the report entitled 'ESFM Criteria and Indicators for the Upper North East, Lower North East, Southern and Eden regions of NSW', referred to in the 10-year IFOA review (2010), to inform public consultation.*
- *Online IFOA information should be presented in accessible and user-friendly forms.*
- *IFOA data should be linked into strategic planning and environmental accounts.*

Delivering the new coastal IFOA

Recommendations:

- *Any new Coastal IFOAs should be reviewed within two years of commencement, to allow an interim assessment of the new outcomes-based approach (if adopted).*
- *The Government should amend s 69G of the Forestry Act 2012 to ensure this.*
- *The Government should clarify expectations regarding content and timing of future statutory reviews of the forest agreements and IFOAs under the Forestry Act 2012.*