

27 October 2016

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QELA, a not for profit organisation, consults with and educates interested professionals and government representatives about planning, development and environmental laws which apply, or are proposed to apply in Queensland. QELA provides a collegiate forum for multi-disciplinary interaction and collaboration.

Dear Sir / Madam,

Review of Koala programs and initiatives

Thank you for the opportunity for Queensland Environmental Law Association (**QELA**) to make a submission about the most appropriate and realistic options to ensure the long term persistence of Koala populations in South East Queensland.

QELA is a non-profit, multi-disciplinary association. Its members include lawyers, town planners, and a broad range of consultants who represent and advise a miscellany of participants in the development industry. The following feedback, therefore, represents a multi-disciplinary approach to the Koala programs and initiatives, dealing with the principles, practicalities and details of the current provisions.

PRINCIPLES AND APPROACH

With regard to Koala programs and initiatives, it is important to recognise the limitations of regulatory controls. By and large, regulatory assessment and controls placed on new projects, including State/Council's assessment process, primarily limit the extent of impacts – rather than aid the recovery of species. Even if all new developments and controlled actions were to cease immediately, no new habitat would be created. Accordingly, if recovery of the Koala is the ultimate objective of the State, it is recommended that additional focus is placed on actions and policy responses which result in protection and rehabilitation of habitat, resulting in a net gain of habitat.

QELA supports the goal of ecological sustainability as expressed in the *Sustainable Planning Act 2009* and, more recently, the *Planning Act 2016*. The link with Koala and habitat protection is via provisions calling up State Planning



Regulatory Provisions. While the intent is for integrated development assessment provisions, the SPA and the Planning Act do not, however, acknowledge other legislation such as the Nature Conservation Act, which protects all native wildlife. There is a better need to intergrate the relevant legislation which aims to protect threatened species to ensure better protection for the Koala.

The Koala and its habitat are regulated at the Commonwealth, State and Local government levels. While there appears to be some co-ordination (e.g. the Queensland Offsets Act) between the various regimes, it appears that, in the main, the co-ordination is not strong.

One of the outcomes of this multi-level approach is that development is being assessed, decisions are being made and land and monetary contributions are being imposed without reference to broader regional goals and objectives.

For consistency, it is recommended that the protection of Koalas should reside within a planning instrument linked to the Nature Conservation Act.

If the existing mapping and assessment regime is retained, consideration should be given to managing the cumulative adverse effects on Koala habitats from multiple clearing proposals. Where developments/activities can be put forward by a different proponent, and each of those developments/activities might not pose a significant threat to Koalas, together they could remove or significantly reduce or constrain an important habitat corridor, with potentially devastating effects. A new policy should include guidance on how cumulative impacts are to be assessed for Koalas, including details of the scale of impacts to be considered (e.g. at a local, regional level) and details of how relevant information could be accessed.

Importantly, the regional goals and objectives regarding Koalas and Koala habitat should be reviewed with reference to rigorous ecological analysis and strategic planning to identify long term locations and linking corridors which do not conflict with other planning goals. For example, if an area is located next to a train station in an urban environment, it is most likely to be more suitable for high density residential development than safe and long term Koala habitat. Conversely, if an area is identified as a long term Koala habitat area, then the State and Local planning intent should reflect this.

Even at the State level, the Koala and its habit are regulated through various documents and processes (including the *Sustainable Planning Act 2009* and its statutory instruments, the *Queensland Offsets Act*, its Regulation and the Queensland Offsets Policy, the *Vegetation*



Management Act 1999, its Regulation and policies and individual local government planning schemes). There is a need to review these documents for consistency.

QELA suggests that the Government consider adopting the key stakeholder working group mechanism that has been used with success in other recent legislative and policy reviews. QELA would welcome the opportunity to participate in that working group for this policy review.

SOUTH EAST QUEENSLAND KOALA CONSERVATION STATE PLANNING REGULATORY PROVISIONS 2010

The main intent of the SPRP is to streamline the assessment process while ensuring avoidance and mitigation of significant impacts on the Koala is provided to protect the species across SEQ. The first step in ensuring mitigation of impacts must be the protection of existing suitable habitats and connectivity. Second, action is required to address the major threats facing the species and provide suitable mitigation measures. We recognise that the SPRP establishes an assessment framework that provides for the development of solutions. However, to enable a better protection for Koala and to provide clarity for the development industry, it is important to refine the SPRP and provide clearer outcomes regarding where development can and cannot occur.

Assessment Powers and Discretion

While the delegation of the assessment of impacts of development on the Koala and its habitat to local government has advantages (in terms of being responsive to local issues), there are aspects of the current *South East Queensland Koala Conservation State Planning Regulatory Provisions 2010* (SPRP) that removes assessment manager discretion while failing to recognise the need for State oversight, co-ordination and funding (including for land acquisition and research). For example, SPRP provisions prohibit clearing of Koala habitat trees in particular circumstances, even when the tree location is unsuitable for supporting safe Koala habitation (e.g. low numbers of habitat trees in industrial areas, high density residential areas and areas isolated by barriers such as road and rail corridors).

For your consideration, the following address specific matters in relation to the current Koala assessment provisions.

Clarification – Unavoidable Clearing

QELA suggests that the Government should provide greater certainty in the Koala SPRP (and associated or future documentation) as to what constitutes unavoidable clearing, as it is



important for all stakeholders that there is transparent assessment of whether appropriate avoidance measures have been considered and undertaken.

Koala SPRP – unavoidable clearing

The Koala SPRP is unclear because the first part of items 2 and 3 mandates that the clearing of certain trees/habitat must be avoided (ie. reading like a prohibition), but then concedes that some cannot be (ie. 'unavoidable clearing'), in which case it must be minimised and offset.

The expression 'unavoidable clearing' is not defined in the Koala SPRP. It is also not defined or elaborated on in any of the offset-related legislation or guidelines published by the State. Although the 'avoid—minimise—offset' hierarchy is widely used in regulatory instruments/policy in various jurisdictions, the expression 'avoid' (and the converse as to what is unavoidable) is not typically defined.

For example, there is arguably the proposition as to whether for the purposes of Division 7 'unavoidable clearing' might be limited to essential infrastructure necessary to service proposed development (eg. sewer, water, roads), but that would seem unduly restrictive in circumstances where the Koala SPRP deals separately with development for linear infrastructure and community infrastructure in Division 4, and the subject matter of Division 7 has been drafted more broadly, as 'development'.

Meaning of unavoidable from other jurisdictions

Judicial consideration and regulatory policy in other jurisdictions shows that the most developed consideration of what is meant by 'unavoidable' is in Victoria, in the context of *Victoria's Native Vegetation Management – A Framework for Action*, which is given effect in development assessment through the Victorian Planning Provisions. There are a number of decisions by the Victorian Civil and Administrative Tribunal (VCAT). As a matter of law, the Victorian decisions are not binding, or for that matter, necessarily persuasive in Queensland, but they do provide some insight which is helpful, from a practical standpoint, in Queensland.

The VCAT decisions say that 'unavoidability' will be influenced by various factors, including:

- a. The conservation significance of the native vegetation at issue.
- b. The capacity for innovation on the part of the proponent.
- c. Complexity in the retention, preservation and protection of vegetation.
- d. The size and physical capacity of the site to accommodate the development in a different form or location.



- e. The context of existing and potential threats to the extent and quality of native vegetation.
- f. The context of zoning and other planning controls operating in respect of the land, such as zoning for urban or residential purposes.
- g. The context of surrounding land uses.

In relation to (f), the VCAT decisions recognise the inherent tensions between competing outcomes that are typical in situations where greenfield sites containing native vegetation are zoned for urban residential purposes (or industrial or commercial purposes) and where the use and development of the land for these purposes will necessarily entail the loss of much vegetation on the site. In one decision (*Villawood*), the Tribunal stated:

‘...with respect to urban development, the government has imposed urban growth boundaries to curtail the spread of urban growth thereby limiting the supply of land for residential development. It is unreasonable to then expect that this land will not be developed for urban purposes at densities designed to optimise use of a scarce resource because vegetation on the land will be lost. If there is highly significant vegetation on the land that should be protected, then this part of the land should be brought into public ownership where its long-term management and protection can be assured. In larger subdivisions, the loss of vegetation can be minimised by designing subdivisions so that vegetation is incorporated into public open space. But in all other aspects it should be assumed that 100 percent of vegetation will be lost...’.

It seems that a similar view could be taken to development in the Urban Footprint, particularly where it is for an ‘urban purpose’ in an ‘urban area’ (as those terms are defined in the *Sustainable Planning Regulation 2009*). However, in a later decision, the VCAT said there is nothing in the *Villawood* decision that should be read as a concession that the urban zoning of the land overrides or somehow outweighs the vegetation outcomes, particularly the ‘avoid’ step. The statement *Villawood* was made in the context of how best to prepare approval conditions to reflect workable offset requirements where clearing of native vegetation have already been agreed to be permitted. In doing so, the *Villawood* tribunal expressed a proviso to any such losses, this being that the initial decision as to the appropriateness of a permit to allow removal of native vegetation must first consider ‘the significance of the vegetation itself and the extent of vegetation removal proposed’. This is consistent with where SPRPs sit in the hierarchy of planning instruments in Queensland.

The reality is that all clearing is avoidable, if one does not do the development. So, presumably, in the development assessment context in which the Koala SPRP operates,



'unavoidable' can't really mean 'unavoidable' in its literal sense. It would see them better view is that:

- it must mean, in context, the minimum amount of clearing reasonably (practicably) required (necessary) to undertake the proposed development (ie. there is no practicable alternative have less adverse impact) and
- in considering what is reasonably required/necessary, the factors to be considered include those set out above.

It is important that there is transparent assessment of whether appropriate avoidance measures have been considered and undertaken. To this end, consideration should be given to preparing a list of factors for the assessment of whether the proposed development can avoid the removal of relevant habitat vegetation. The following questions along with the VCAT factors listed above may be relevant considerations:

- a. How has the applicant attempted to avoid clearing [of non-juvenile Koala habitat trees]?
- b. Are there alternative sites on the subject land that could reasonably practicably accommodate the proposed development (or micro-sited elements of it) that would avoid clearing [of non-juvenile Koala habitat trees]?
- c. Can these locations be used instead? Why/why not? Amending the Koala SPRP to provide clarity along these lines is encouraged to provide greater certainty for all stakeholders.

Queensland Environmental Offsets Act (2014) and subordinate legislation

It is understood that offsets are to be used as a strategy only in circumstances where avoidance and mitigation has resulted in residual impacts. Offsets however have an advantage of enhancing and protecting habitat. As one of the major threats to the Koala is fragmentation of habitat, it follows that the offsets which are generated by the new policy and other processes are, as far as possible, focussed and connected.

QELA considers that a central ecological focus of all layers of government needs to be the identification and declaration of bioregional ecological corridors of various scales, focussing on protection and reconnection of reserves and habitats.

The assessment of major projects at State and Federal level in recent years has created obligations for proponents to secure offsets for a range of habitats presumably totalling many tens of thousands of Hectares. Whilst approval conditions specify the type of habitat to be secured as offsets, seeking 'like for like' there is little guidance however regarding preferred



locations of habitat. As habitat is already fragmented, this largely uncoordinated approach of securing offset areas is likely to result in a different pattern of fragmented habitats.

We recommend that key bioregional ecological corridors are identified and a range of measures be enacted to facilitate the prioritisation of offsets into habitat corridors. As an analogy: if the offset areas are pieces of an ecological jigsaw puzzle, the current approach is akin to attempting to piece the jigsaw together without access to the picture on the lid. QELA recommends that State collaborate with Federal Government and other stakeholders to map the picture on the lid.

In some cases, offsets should be provided prior to the development starting. In most cases, the rehabilitation of offset areas starts few months to a year after clearing as occurred. Koala living in these areas have lost their habitat and do not benefit from the offset area until the vegetation has reached maturity, which can take a few years. Required timeframes to provide rehabilitation or offset should be conditioned to reflect the actual ecological requirement to support Koala population.

Koala Survey & Monitoring

While the State Government conducts Koala surveys in South-East Queensland; a large number of consultants also collect data regarding Koalas in SEQ. This data should be reflected in Wildlife Online to ensure that the most up-to-date information is provided and informed the relevant authorities/consultants.

Data and/or information (published or unpublished literature for instance) is often difficult and time consuming to access. For example, to obtain detailed data of Koala mortality and Koala sightings across the Brisbane area, a response to a written request to the State Government for data took more than four (4) months in order to complete the EPBC Act referral. Moreover, proponents are required to source information from non-governmental groups such as the Australian Koala Foundation (AKF) map. However, there are potential issues with use of information from such groups as data can often be scientifically unverified (e.g. AKF mapping and tree species preference data for the bio-region).

Better guidance is required in order to clarify the type of information that would be considered suitable by State/Council to determine the genetic diversity of Koala population in an area.

It is essential that mapping be standardised to identify known areas of Koalas and the presence of Koala habitat at a finer scale.



CONCLUSION

From a legal, ecological and planning standpoint, the current system contains flaws in terms of clear goals, mapping, and the supporting policy documentation. In summary, the recommendations of this submission are:

- The review of statewide Koala provisions should be based on rigorous ecological and strategic planning analysis to determine where Koalas and habitat are to be protected, how and by whom.
- Consideration be given to creating a key stakeholder working group for this policy review.
- Terminology such as “avoid” should be clarified or removed to improve interpretation for all parties.
- Offsets should be used to contribute to coordinated improvements and maintenance of strategically identified habitat corridors.
- Data and monitoring information should be readily available and mapping standardised.

We thank you for the opportunity to make a submission in relation to the above matters. We would welcome the opportunity to assist the Department further, if required.

Yours sincerely,



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President
Queensland Environmental Law Association

