



## Appendix D – Evaluation of consequences of proposed change to clause 7.5 Koala Habitat

This Appendix contains more detailed analysis of Issue 7 (refer to **Appendix A**), as required by the Gateway Determination (**Appendix C**).

That determination required that this Planning Proposal be amended

“... to include additional information on the amount of land and number of lots that will be impacted as a consequence of the exclusion proposed under amendments to Clauses 7.5 *Koala habitat* and 7.9 *Development subject to acoustic controls*. Further, assessment of the potential impact on the uptake of complying development and any specific assessment criteria for development within these areas is to be included prior to the commencement of public exhibition.”

For additional information relating to clause 7.9 *Development subject to acoustic controls* refer to **Appendix E**.

### 1. Context

#### 1.1 LEP 2011 clause 7.5

Clause 7.5 of *LEP 2011* states:

#### *LEP 2011*

##### 7.5 Koala habitat

- (1) The objective of this clause is to ensure that development is designed to retain koala habitat.
- (2) This clause applies to land that is shown as “Koala habitat area” on the Koala Habitat Map.
- (3) Development consent must not be granted for development on land to which this applies unless the consent authority is satisfied that the development is consistent with the relevant provisions of any adopted plan of management prepared pursuant to *State Environmental Planning Policy No 44—Koala Habitat Protection*.
- (4) Development consent must not be granted for a subdivision of land to which this clause applies unless the consent authority is satisfied that each lot that would be created by the subdivision will contain a sufficient building envelope to enable future development of the lot to comply with subclause (3).

**Note.** The land shown as “Koala Habitat” does not identify all koala habitat areas within the land to which this Plan applies.

The areas mapped as Koala habitat area are shown on map extracts at the end of this Appendix.



The aims of *State Environmental Planning Policy No 44 - Koala Habitat Protection* (SEPP 44) are:

### ***SEPP No 44 - Koala Habitat Protection***

#### **3 Aims, objectives etc**

This Policy aims 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.

Where required, a Koala Plan of Management (KPoM) can be prepared in accordance with SEPP 44, and, subject to compliance with its provisions, development can take place upon the relevant land.

Particularly following approval of a (residential or rural residential) subdivision subject to compliance with a KPoM, there is nothing applying to subsequent development (eg housing) that requires compliance with the relevant provisions of the KPoM. This can mean, for example, that trees marked for retention can be removed, or inappropriate fencing is used, or swimming pools built without koala-friendly measures incorporated.

Council introduced clause 7.5 as a means of requiring subsequent development to be consistent with relevant KPoM provisions. The Koala habitat areas included on the LEP Koala Habitat Map were selected to include the more sensitive areas from adopted KPoMs - they do not simply include all land subject to KPoMs. And it is probable that in the future Council may include additional land in new KPoMs on a similar basis.

#### **1.2 Codes SEPP**

However, clause 7.5 only applies where development consent is required under *LEP 2011*. It does not apply to development permitted as exempt development or complying development under *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* - the "***Codes SEPP***".

There should be a way of limiting the scope for development under the *Codes SEPP* to ignore relevant provisions of a KPoM applying to that land.

The drafting of the Codes SEPP recognised that sometimes exempt development or complying development may not be appropriate, or other approvals are still appropriate.

In relation to **exempt development**, clause 1.16 (3)(b) states the development must "not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent".

In relation to most **complying development** (other than that referred to below), clause 1.18 (1)(h) states that "if it involves the removal or pruning of a tree or other vegetation that requires a permit or development consent .... – before the complying development certificate is issued, have a permit or development consent for that removal or pruning".



In relation to the following complying development, in part clause 1.19 of the *Codes SEPP* states:

- in subclause (1)(e) - that for the *General Housing Code* and the *Rural Housing Code*, and
- in subclause (5)(f) - that for the *Commercial and Industrial (New Buildings and Additions) Code*,

complying development must not be carried out on land identified by an environmental planning instrument as being:

- (i) within a buffer area, or
- (ii) within a river front area, or
- (iii) within an ecologically sensitive area, or
- (iv) environmentally sensitive land, or
- (v) within a protected area, or

There is no definition for an “ecologically sensitive area”, though logically this should encompass Koala habitat areas on the LEP 2011 Koala Habitat Map. The purpose of the proposed amendment is to make it explicit that Koala habitat areas on the LEP 2011 Koala Habitat Map are “ecologically sensitive areas” for the purpose of clause 1.19 of the *Codes SEPP*.

### 1.3 General Housing Code and the Rural Housing Code

Subject to compliance with the requirements of the *Codes SEPP*, the *General Housing Code* and the *Rural Housing Code* cover:

- the erection of new single storey or two storey dwelling house,
- alterations or additions to an existing single storey or two storey dwelling house,
- the addition of a second storey to an existing single storey dwelling house, and
- erection of new ancillary development, or alterations or additions to existing ancillary development,

upon land within

- Residential zones R1, R2, R3, R4 and R5, or
- Rural zones RU1, RU2, RU3, RU4, RU5 and RU6.

**Note:** LEP 2011 does not have a Zone RU4. Zone RU3 applies to State Forests, and does not permit dwelling houses, and therefore within this area the Rural Housing Code does not apply to land within Zone RU3.

Under clauses 3.6A and 3A.7 respectively, these codes automatically allow tree removal:

A complying development certificate for complying development under Division 1 is taken to satisfy any requirement under this Policy for a permit or development consent to remove or prune a tree or other vegetation on a lot if:

- (a) the tree is not listed on a significant tree register or register of significant trees kept by the council, and
- (b) the tree or vegetation will be within 3m of any development that is a building that has an area of more than 25m<sup>2</sup>, and
- (c) the tree or vegetation has a height that is less than:



- (i) for development that is the erection of a new dwelling house—8m and is not required to be retained as a condition of consent to the subdivision of the lot, or
- (ii) for any other development—6m.

#### 1.4 Commercial and Industrial (New Buildings and Additions) Code

Subject to compliance with the requirements of the Codes SEPP, *Commercial and Industrial (New Buildings and Additions) Code* covers:

- the construction of a building for the purposes of industry (other than heavy industry) or a warehouse or distribution centre,
- an addition to an existing building that is used for the purpose of industry (other than heavy industry) or a warehouse or distribution centre,
- the external alteration of an existing building used for the purpose of industry (other than heavy industry) or a warehouse or distribution centre,
- an addition to the rear of existing commercial premises, other than on a corner lot,
- the external alteration of existing commercial premises,

upon land within:

- Business zones B1, B2, B3, B4, B5 and B7,
- Industrial zones IN1, IN2, IN3, IN4, or
- Special Purpose zone SP3.

It expressly excludes development that requires the clearing of more than 1,000m<sup>2</sup> of native vegetation. Clause 5A.3 also automatically allows tree removal on a relatively similar basis to the other codes.

## **2. Evaluation of consequences of proposed change**

The proposed change would only potentially affect complying development under:

- the *General Housing Code*,
- the *Rural Housing Code*, and
- the *Commercial and Industrial (New Buildings and Additions) Code*.

One of the problems with development under these Codes is that if the development is to be constructed in proximity to a tree, then under clause 3.6A, 3A.7 or 5A.3 (respectively) the tree can automatically be removed - this has led to the loss of koala food trees that had been identified for retention in the original subdivision or other previous consent.

The operation of clause 7.5 is not to prohibit development, but to ensure that it is carried out in a manner compatible with relevant provisions of a KPoM applying to the land.

If a dwelling house is permitted, then in principle clause 7.5 is unlikely to lead to the refusal of consent. It may lead to requests for redesign or resiting in order to minimise adverse impacts. It could lead to imposition of consent conditions relating to facilitating a koala-friendly outcome - eg fencing.

In this regard, the proposed change will have limited impact on the amount of land and number of lots that will be affected. It will have an impact on the uptake of complying development for the land specifically mapped as Koala habitat area, but the consequence will be that a development application will be required. This means



additional fees and a longer approval process, but there will otherwise be limited impact on development outcomes.

In relation to development under the *Commercial and Industrial (New Buildings and Additions) Code*, it is harder to anticipate the impacts. At present there is no land to which this Code applies which is mapped as Koala habitat area. If this were to change, then this may curtail the extent or scale of development so that it is compatible with the relevant KPOM.

### 3. Specific assessment criteria

The specific assessment criteria that would apply are already contained in clause 7.5 of *LEP 2011*:

- (3) Development consent must not be granted for development on land to which this applies unless the consent authority is satisfied that the development is consistent with the relevant provisions of any adopted plan of management prepared pursuant to *State Environmental Planning Policy No 44—Koala Habitat Protection*.
- (4) Development consent must not be granted for a subdivision of land to which this clause applies unless the consent authority is satisfied that each lot that would be created by the subdivision will contain a sufficient building envelope to enable future development of the lot to comply with subclause (3).

No change is proposed to these provisions.

### 4. Relevant land

Map Sheets 1 to 3 on the following pages show:

1. The land currently identified as *Koala habitat area* on the **Koala Habitat Map**.
2. Land proposed to be so identified - refer to Issue 27 in **Appendix A** for more details on this. (A minor adjustment to a boundary described in Issue 13 is not shown.)
3. For the areas affected by the above, land having a zoning in *LEP 2011* to which under the *Codes SEPP* the following apply:
  - General Housing Code,
  - Rural Housing Code, and
  - Commercial and Industrial (New Buildings and Additions) Code.





