



TIMBER NSW

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Submission made to:

<https://www.planningportal.nsw.gov.au/draftplans/exhibition/koala-habitat-protection-guideline>

Guideline *State Environment Planning Policy (Koala Habitat Protection) 2019* (Koala SEPP 2019)

This submission is made of the following sections:

- De-identified statements from either PNF operators or people who derive timber from PNF operations.
- Background
- Tail Wagging the Dog.
- Bushfire
- Commentary on the Maps
- Core Koala Habitat
- Species List and PCT
- Aspects of Part 3 of the Guideline
- Annexure 3 of the Guideline
- Commentary on Consultation
- *Guideline* not a statutory rule
- *Guideline* stated aim

De-identified statements from either PNF operators or people who derive timber from PNF operations.

No 1

With only 5 approved KPoMs in NSW and several of those being very limited in extent or identification of core koala habitat, my PNF operations have not been impacted by SEPP 44 at all.

The new Koala SEPP on the other hand will almost certainly shut down the vast majority of PNF operations, particularly in council areas Tweed, Bellingen, etc. The definition of core koala habitat has been watered down to the extent that all vegetation qualifies, and it just requires a historical sighting within 2.5km on the coast or 5km out west to trigger CKH. Then council has discretion to extend the CKH area to include unspecified buffer areas and connective corridors (I assume using the mapped predicted feed tree vegetation) between areas of CKH.

Several councils, like Coffs Harbour and Clarence, and Government's DPIE (using "I Spy Koala") have actively been encouraging "citizen scientists" to notify them of

koala sightings, which are added to BioNet. These records have been accepted by DPIE as accurate, yet you'll note there is one recorded koala (on BioNet) "swimming" off Coffs Harbour.

No 2

We observe the requirements of the PNF Code which has particular prescriptions relating to the appropriate practices for the conservation of koalas. These measures limit the harvesting of Koala food trees in areas where koalas are known to occupy.

Operating under the old SEPP has had minimal additional impact on our PNF operations at the overall scale on the volume and supply of timber from PNF across our region to our business.

The majority of PP supply to our business comes from rural shires who have a generally supportive stance to the timber industry. There is a concern that as an increasing number of Councils get involved in KPOMs that this situation will start to change.

We have been impacted by the Ballina Council's KPOM which has mapped a section of forested private land to the west of the city of Ballina as core koala habitat. This has led to the cancellation of a number of harvesting operations in that area, due to the imposition of a requirement to apply for a DA on top of the normal LLS approval process for a PNF Plan. These operations have been unable to proceed as the cost of preparing such a proposal with no guarantee of approval is too onerous for the volume of timber likely to be produced.

From the advice we have received to date and from reviewing the proposed mapping and species list attached to the new Koala SEP it appears to me that the harvesting of timber from private property would be unviable from a large portion of the North Coast. This in turn would threaten the viability of our business and financially impact on all of the harvesting contractors and property owners.

No 3

Dear Ministers,

Take time and read this inspirational story of generational sustainability throughout the Timber Industry. This story is just the epitome of why you should repeal the Koala SEPP 2019 and go back to the original model. Just Imagine if you could all give the same story of strength and tenacity to work within an industry that constantly throws challenges at you. Here is the [McPherson's](#) and their story is well worth opening that attachment to this email) and feeling the pride and hard work that comes from their story.

Please we ask you to repeal the Koala SEPP 2019 and allow our Industry to thrive.

Industry; Timber

Generation/Length of Involvement: [Peter](#) is 4th generation sawmiller and Logger with 55 years personally in the timber industry.

Our Story:

[Peter's](#) great grandfather was a logger. His grandfather was a sawmiller and logger. His father was a log faller and a bullock driver. [Peter](#) left school when he was 14 years old to start his career cutting logs for his father's bullock team. At 16 years old

Peter became a sawyer for FT Shipman Sawmill, during this time he met his wife Sue. From 1977 – 1991 Peter had branched out on his own and became a contract log faller and sawyer often with his eldest son John joining him to learn the industry. During this time Peter and Sue had 5 children and built their first home in South Grafton. 1992 saw Peter and Sue purchase their first two logging machines and start their own company, Vaccoun Pty Ltd, with the eldest son John working for him. Over the next 6 years Peter and Sue's company grew to employee (sic) 18 crew over 6 operations. During this time Peter would be supplying 25 different sawmills.

In 2000 Peter and Sue brought their first sawmill at Dundurrabin and began trading under Tableland Timbers. This sawmill employed 10 sawmill hands. The Dundurrabin mill was operational until 2016 and shut down because they moved their operations to Trenay where they had purchased their second sawmill. This second mill has a staff of 22 mill hands, sawyers and office staff. Tableland Timbers also employs 2 logging 'bush' crews consisting of 6 plant operators and 1 truck driver. There are also 4 extra sub-contracted trucks.

Sue and Peter have 5 children, 23 grandchildren and 3 great grandchildren. Their 4 sons have worked full time for the family business straight out of high school and the 3 eldest sons have branched out and started up their own successful companies, the youngest son Craig is still employed by Tableland Timbers managing the bush crews. Most of the older grandsons have worked at the mill and in the bush on and off with a keen interest to follow on with the family business.

Tableland Timbers takes great pride in sponsoring local sporting teams and functions including Timberfest in Glenreagh (Peters home-town), which is a major festival for this small-town gathering hundreds from the local and wider community.

HOW WILL KOALA SEPP AFFECT OUR LIVELIHOOD

If the Koala SEPP is to go ahead then our sawmilling/logging business will be unable to operate which puts ours and many other families that we employ, out of work.

The stress it will place on myself and my family will be catastrophic. Not to mention all the families that Tableland Timbers employees, it does not stop there, this will have a huge flow on effect to fuel supply companies, machinery and tool companies, Woolworths, Coles, Aldi and many more.

With population increase brings a housing demand increase, the demand for timber will not stop. So instead of an industry employing hard working Australians sustainably harvesting a fully renewable resource Australia will get its timber for building from rainforests overseas.

PNF does not affect koala colonies, if anything, it improves their food resource with a good mix of sweet and young to mature growth. As we have seen in recent months the largest threat to koalas and many other species is unmanaged land that produces devastating fires.

No 4

I refer to the information request re impacts of the new Koala SEPP. The DPIE North Coast PNF Project – *NSW planning and regulatory instruments that interact with*

private native forestry (June 2018) is important background reading. The DPIE report addresses the planning environment pre the New K-SEPP and considers LGA dual consent and Koala SEPP 44 impacts on PNF at that time.

The pre-existing condition is that LEPs:

- Prohibit forestry on 6.5% of PNF land; and
- Require Council “dual consent” on 25% of PNF land.

In respect of Councils requiring “dual consent” Koppers has most exposure to Kyogle and Port Macquarie-Hastings Council (7% and 3% of total annual supply respectively) and less exposure to other Councils requiring consent for Forestry in land use zones RUI & RU2. Koppers does not operate in Tweed or Byron Council areas outside plantation supply. I confirm that LLS routinely notify Councils about PNF-Plans approved within their LGAs to be included on title certificates. In a meeting with the GM Kyogle Council last week re “dual consent” requirements Graham Kennett said he considered forestry to be a “continuing use” and not requiring development consent and not an issue. Council does not have the relevant expertise to administer forestry and prefer to defer to LLS or EPA. Removing the “dual consent” provision from land use zones RU1 and RU2 could be a problematic for Council. So “dual consent” may be legal requirement but is not currently restricting supply.

The New K-SEPP looks set to become an ever-widening supply squeeze with the enhanced definition of “core koala habitat” and the facilitated production of KPoMs by willing Councils. Nearly all current suppliers operate on LLS issued PNF-Plans as older issue EPA PNF-Plan areas have been harvested in the current cutting cycle and are not likely to yield again until the end maximum 15-year term of the approval. If PNF is not exempt from the K-SEPP then we have a real supply problem. Koppers is an exclusive pole producer and about 45% of the company's pole supply comes from private land that is impacted by the K-SEPP. Koppers currently supply 60% of all hardwood poles used in Australia for electric power distribution. All other pole producers will be similarly impacted.

No 5

The implementation of SEPP 44 (Koala SEPP 2019) will undoubtedly mean the closure of my business in Bowraville, which has been in operation for 19 years.

Bowraville in one of the most impoverish towns there is in Australia.

I currently employ 18 employees and myself plus 6 staff directly in the logging sector which they rely on my business for 80% of their workload.

This impact will create a devastating impact for the economy as my direct wage bill for the business is \$750,000 - \$800,000 a year. My transport to the market are approximately \$400,000 a year.

Approximately \$400,000 spent on local tradesman, boilermakers, machinist trade supplies, bearing shops, hardware stores and approximately \$2.5 million on resource logs for royalty including the 6 contractors in the bush plus 2 log truck operators this is without electricity and other costs to the business.

The loss of jobs for Haulage companies who travel as far as Newcastle as they transport the by-product of sawdust and wood-chip and this is only at the top of the pyramid to the flow down to the local economy.

It is also going to render my business unsaleable as its approximate worth is between \$3-\$5 million if SEPP 44 is introduced.

A major concern is for my employees as to where they will gain employment in this Bowraville area and surrounds many of who are unskilled and have no transportation, this is also going to have a flow on effect to older farmers to the extent that have nurtured and managed there (sic) forests for many decades only harvesting as needed under urgency. They do not get the pension due to their asset base and will rely on the timber as a resource of pension income, now that has been taken away from them.

This is going to be far reaching and debilitating closing down many possible subdivisions or investment in the local rural communities.

Beside the insult of the stimulus package of the National Party giving out \$10 billion of our tax money to the unemployed and on the benefits to stimulate growth.

Then the State Liberal National Party on the other hand coercing (sic) with this SEPP 44 closing down not just businesses and industries across NSW with no compensation is an act of utter stupidity, creating unemployment, land devaluation and negative outcome to Morrisons stimulus package.

Background

Summary

The new Koala SEPP 2019 seeks to ignore the existing regulatory framework going far beyond where any other SEPP has gone before. It represents a major departure from the Koala SEPP 44.

The *Guideline* oversteps what a SEPP is intended to do under the Environmental Planning and Assessment Act 1979 (EPA Act).

The *Guideline* has as a policy structure the rezoning of RU1 and RU2 land to E2 by the use of the provisions of the Land Services Act 2013 and its Regulations and in particular Part 5A of that Act.

By applying the Native Vegetation Regulatory Maps (NVRM) regime in Part 5A, which has a specific policy objective (exemption) for private native forestry (PNF) in Part 5B, the Koala SEPP 2019 claws back PNF operations into Part 5A NVRM regime.

Submission

Koalas in New South Wales are widespread and occur naturally at low densities. Within New South Wales the koala is known to occur in over 750 different vegetation types (Office of Environment and Heritage OEH, 2019). In area, it is roughly estimated that the koala may be found in over half of all NSW forested land (10 million hectares).

To date only three koala populations have been formally listed as threatened under the Biodiversity Conservation Act 2016 - koalas in the Pittwater LGA (determined in 1998), the koala population at Hawks Nest and Tea Gardens (determined in 1999) and the koala population between the Tweed River and Brunswick River east of the Pacific Highway (determined in 2016). The NSW Threatened Species Scientific Committee has rejected proposals for listing koala populations as threatened at Bega (determined in 2007) and Port Stephens (determined in 2018).

When State Environmental Planning Policy No 44 was originally gazetted in 1995 its principal purpose was to mitigate the impact of rapidly expanding coastal development that was encroaching on well-known coastal koala colonies. It was never intended that

Koala SEPP 44 be used to regulate native forest management activities (like forestry) across the koala's entire (10 million ha) home range. The limits of the intent of original Koala SEPP 44 are reflected in its 25-year history with all its adopted Koala Plans of Management being located along the coast (where urban development is occurring), namely:

- Kempsey Council Comprehensive Koala Plan of Management for the Eastern Portion Kempsey Shire LGA 2011
- Port Stephens Council Comprehensive Koala Plan of Management 2001
- Coffs Harbour City Comprehensive Koala Plan of Management 1999
- Lismore City Council Comprehensive Koala Plan of Management 2013
- Ballina Shire Koala Management Strategy incorporating the Ballina Shire Comprehensive Koala Plan of Management 2017.

There are a further nine councils that have either undertaken koala habitat studies and/or commenced work or have draft plans of management. All but two of these are also located along the NSW coast.

The management of native vegetation and fauna habitat has for many decades been regulated by laws designed specifically for that purpose; laws such as the Threatened Species Act and Native Vegetation Act (which have since morphed into the Biodiversity Conservation Act and Local Land Services Act), the National Parks and Wildlife Act, the Forestry Act and the Protection of the Environment Operations Act. Given the existence of this regulatory framework it is reasonable to presume that the intent of planning laws such as SEPP 44 should not be to impose additional regulation on forestry (or other routine agricultural activities).

The new Koala SEPP 2019 seeks to ignore the existing regulatory framework going far beyond where any other SEPP has gone before. It represents a major departure from its original intent (25 years ago) and the real intent of SEPPs.

In effect the new Koala SEPP 2019 will operate independently duplicating existing regulation and making future compliance for forest owners, managers and landholders extraordinarily complex and difficult.

If the Government genuinely believes that it needs special planning laws for the management of the koala (across its entire home range) then it should be aware that there are over a thousand other listed threatened species which (on scientific grounds) are equally deserving.

As the Government has introduced the new Koala SEPP 2019 on 1 March 2020, it needs to urgently look at all tenures as the key threats to koalas are tenure blind. In 2017 Law et al. developed a field validated koala habitat suitability model for 8.5 million hectares of north-eastern NSW. The published paper found that the largest determinant of koala habitat suitability was wildfire frequency (Figure 1). Law *et al.*'s finding reveals that limiting the impact of future wildfires is the single most important key to securing the koala's future.

If the new Koala SEPP 2019 is to achieve its own stated objectives, then it should take account of the risks posed by wildfire. The 2019-20 wildfires have destroyed millions of hectares of koala habitat. The vast majority of this habitat is located in National parks and reserves. Under the new Koala SEPP 2019 examination of the way vegetation is managed in NSW National Parks and reserves needs to be given the highest priority.

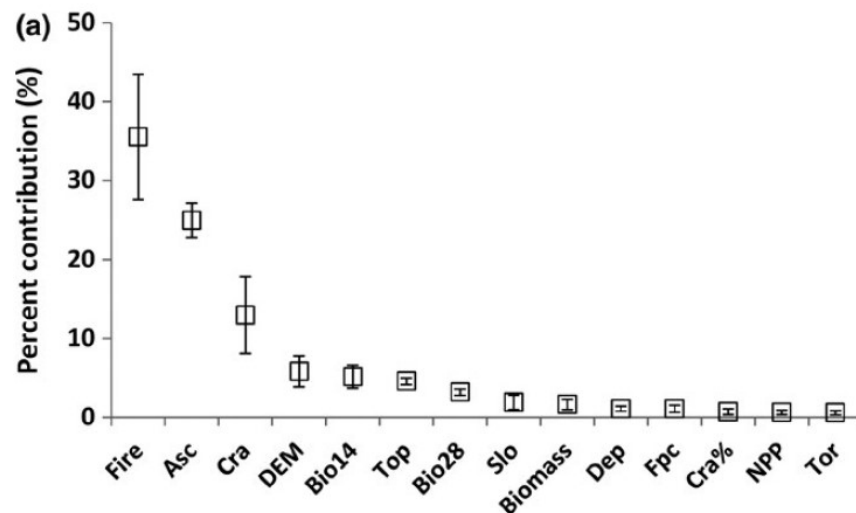


Figure 1 - Percent contribution of the 14 predictor variables – Fire (wildfire frequency), Asc (soil type), Cra (vegetation type) (Source: Law et al. 2017)

The Tail Wagging the Dog

Submission

The tail wagging the dog: The Koala SEPP 2019 will over time undo the Government's 2011 election promise to remake native vegetation into an acceptable workable regime.

Whilst the law of Native Vegetation Regulatory Maps was well and truly in place before 1 March 2020, the full effect of the Koala SEPP 2019 over a relative short time, will be to alter the status of land upon which PNF and agriculture businesses, can operate efficiently and effectively, to E zoned land. The practical impact of this change will be the introduction of prohibitive costs if any work is required at all involving native vegetation removal or not.

The law around Native Vegetation Regulatory Maps (NVRM) was structured to provide for workable Codes of Practice to protect the indigenous or native environment without repeatedly having to deal with slow moving and indecisive bureaucratic engagements interrupting the immediacy of the seasonal nature of land based businesses. This was Government policy in response to calls from business and industry.

Then arrives a SEPP approved by an Executive Meeting that overturns this policy. It overturned by simply and cleverly using the current law and its provisions that allows the Environmental Agency (Environment Energy Science EES)) to recategorise land. The Agency knows this will cause the cessation of business activities or impede activities to such an extent that the land will become a de facto State National Park in private ownership. Careful reading of the draft Guideline reveals this Agency understanding.

This is not an accident of drafting but a deliberate policy move by the Environmental Agency (EES). It is clear that the elements involved here were "in play" before 2013.

The key is the Maps in Part 5A.

Native vegetation regulation worked well without Maps under the Native Vegetation Conservation Act 1997. The Native Vegetation Conservation Act 1997 was repealed and replaced with the Native Vegetation Act 2003 (no maps, just plans).

The Coalition Government won office on 11 March 2011.

The Coalition Government introduced the Maps in native vegetation control in 2013 when the Local Land Services Act was enacted.

Was the Government blindsided by a carefully manipulated and complex bureaucratic agenda? The answer is clearly “Yes”.

It is obvious on careful analysis that there has been a deliberate act of having the subordinate legislation (if the *Guideline* is such) – (the Tail) - wag the dog in terms of the Local Land Services Act Part 5A to effectively close down Part 5B of that Act.

It has just taken time and the acquiescence of the Coalition Government. If not then it is the agenda that the Coalition Government has been working to since 2011 when elected.

Bushfire

Submission

The Environment Energy and Science Group (EES) of DPIE ignore the one key piece of recent scientific research regarding koala activity. That is that bushfire has the greatest impact on koala population and koala habitat range.

This is just not acknowledged. Why?

Bushfire prevention techniques are ignored, in fact inhibited, in the workings of the Koala SEPP 2019. Why?

There is no research that refutes that PNF does not affect koala colonies, if anything, it improves their food resource with a good mix of sweet and young to mature growth. As we have seen in recent months the largest threat to koalas and many other species is unmanaged land that produces devastating fires.

There is a persistent and consistent refusal to learn from generations of knowledge on bushcraft and the care and protection of native animals. This is the same as with the prevention of bushfire and the containment of bushfires once active.

Timber NSW is of the opinion that the Environmental Agency (EES) within DPIE is acting from an ideological basis clothed in a coat of preferred, but not necessarily correct, alleged science.

Submissions are consistently ignored. It appears that submissions are simply a “tick the box” process and largely ignored. There is certainly never any constructive dialogue - the view is that the departments/agencies neither want it nor seek it as the agenda is already determined. There is no room for proper administration. It is a matter of the application of a particular ideology.

Commentary on the Maps

Summary

Maps are inaccurate and simply wrong.

Environment, Energy and Science of DPIE has not ‘ground proofed’ the Maps and they do not nor any other part of Government intend to do so.

There is a clearly stated policy in the draft *Guideline* design that industry will bear the cost of ‘ground proofing’ inaccurate maps.

This is unacceptable and an abrogation of the role of Government. It is effectively a discriminatory de facto land tax on agriculture.

Particularly when the Deputy Premier admits the ‘maps are inaccurate’.

The Maps should be withdrawn immediately.

Good maps are needed which show the extensive nature of actual koala records and that suitable habitat occurs everywhere.

Submission

It is on the Parliamentary Record that the Maps associated with the Koala SEPP 2019 are ‘wrong’.

Mr John Barilaro: We are relying on maps that have now been released. Those maps, in my mind, are wrong. Like under the biodiversity legislation, the maps got it wrong. They are spatial maps that are not ground truth and my concern is that it will actually impact on farms, it will impact on industry and the opportunity for development in regional and rural New South Wales

Parliamentary Budget Estimates Transcript.
Transcript Parliament of NSW Budget Estimates 2019-202
Tuesday 17 March 2020,
Portfolio Committee No 4- Industry, page 43.

Observations from a resident in the Lismore region

Using the maps ground ‘truthed’ his wife’s macadamia plantation in the Ballina Shire. The maps show that part of the plantation was mapped in pink which means Category 2 sensitive regulated lands.

There was one eucalypt tree in the middle of the plantation.

Observations on a Caravan Park on the mid North Coast

The Caravan Park on the maps is coloured pink.
It has Norfolk pines, palm trees and some bottlebrushes but no eucalypt trees.

The colour pink to those readers not within the Department is explained in following extract below taken from a Government Fact Sheet.

A NSW Government Fact Sheet dated November 2017 states:

The colour Pink on the maps stands for Category 2 Sensitive Regulated Land. This is defined as Rural land where clearing of native vegetation is more restricted than on other Category 2 land. This includes lands that are sensitive lands due to factors such as; the presence of wetlands, rainforests, critically endangered plants and ecological communities, or land that is subject to protection covenants such as conservation or incentive property

vegetation plans. In answer to the question, 'What land management activities can I do under Part 5A of the LLS Act 2013?' the answer is Clearing cannot be carried out under the Land Management (Native Vegetation) Code. Allowable activities are limited. Clearing may be carried out if authorised by a Panel approval under Division 6 of the *LLS Act* or under certain other legislation.¹

Observations made at a meeting in Kyogle by the Kyogle Council

Kyogle Council at a public meeting in the last fortnight observed that the maps keep changing on the Government website.

Koala Development Application Map

This Map is used when a Council receives a development Application after 1 March 2020 and the Council is listed in the draft *Guideline*.

This map is defined in the Koala SEPP 2019:

Koala Development Application Map means the *State Environmental Planning Policy (Koala Habitat Protection) 2019—Koala Development Application Map*.

The draft *Guideline* in Part 1.6 states:

The **Koala Development Application Map** identifies areas that have highly suitable koala habitat and that are likely to be occupied by koalas. **Landholdings captured by the map (whether the whole lot or only a portion is covered) need to consider the impact of their development on koalas or need to undertake a survey if they believe the map has been incorrectly applied to their land (in accordance with Appendix C).** The Koala Development Application Map applies where there is no approved Koala Plan of Management for the land and identifies which areas trigger the development assessment requirements for core koala habitat. (Emphasis added).

Clause 10 (a) of the Koala SEPP 2019:

A council is not prevented from granting consent to a development application for consent to carry out development on land if—

(a) the land—

(i) is not identified on the *Koala Development Application Map*, or

(ii) does not have an approved koala plan of management applying to the land, or (b) the council is satisfied that the land is not core koala habitat.

Site Investigation Area Map

This Map is essential to drafting a KPoM.

This map is defined in the Koala SEPP 2019:

Site Investigation Area for Koala Plans of Management Map means the *State*

¹ NSW Government Fact Sheet: What is the Native Vegetation Regulatory Maps? Author OEH 2017/0640 Nov 2017, Found at <http://141.243.8.146/resources/bcact/what-is-the-NVR-map-fact-sheet-170640.pdf>

The draft Guideline provides in Part 1.6:

The **Site Investigation Area Map for Koala Plans of Management** identifies areas that are likely to have koala use trees and excludes areas with a low probability of koala habitat. This map identifies areas councils should investigate when identifying core koala habitat in Koala Plans of Management and the extent to which core koala habitat can be identified.

Clause 11(4) of the Koala SEPP 2019

(4) Land may be identified in a koala plan of management if—

(a) the land is identified on the *Site Investigation Area for Koala Plans of Management Map* as an area where this Policy applies, and

(b) the land is core koala habitat.

The Maps have Ministerial approval.

Clause 7 of the SEPP states:

7 Maps

(1) A reference in this Policy to a named map adopted by this Policy is a reference to a map by that name—

(a) approved by the Minister when the map is adopted, and

(b) as amended or replaced from time to time by maps declared by environmental planning instruments to amend or replace that map and approved by the persons making the environmental planning instruments when the instruments are made.

(2) Any 2 or more named maps may be combined into a single map. In that case, a reference in this Policy to any such named map is a reference to the relevant part or aspect of the single map.

(3) Any such maps are to be kept and made available for public access in accordance with arrangements approved by the Minister.

(4) For the purposes of this Policy, a map may be in, and may be kept and made available in, electronic or paper form, or both.

Note. The maps adopted by this Policy are to be made available on the NSW planning portal.

In both circumstances each of the individual maps form one part of a two part test to either:

- not grant a development application, or
- establishing a KPoM.

Yet, in spite of these significant activities, the maps are inaccurate.

This is 'so unreasonable that no authority should ever accept' this. But it appears the

NSW Government, EES and DPIE do.

(See *Associated Provincial Picture House v Wednesbury* [1948] 1 KB 223 per Lord Greene at 230).

Why is this occurring?

The Maps should be withdrawn until the Environmental Agency (EES) and the Environment Energy and Science Group of DPIE can 'ground truth' them.

The private sector should not be 'taxed' to undertake the Government's work in such a discriminatory manner.

The private sector also should not be required to engage a 'suitably qualified and experienced person' to fill the gap created by the lack of fieldwork of EES and the DPIE as suggested in the draft *Guideline*.

Core Koala Habitat

Summary

Ministers of the Government and Government officials are saying (or have been told to say) that the SEPP will have limited impact.

This is simply incorrect and is political spin.

'Core koala habitat' as defined has two limbs; (a) and (b).

The second limb is of great concern.

The first part of this limb of core koala habitat is the survey method outlined in the *Guideline*. This means any country with eucalypt trees on it will qualify as 'highly suitable habitat'.

There is then second part that requires a koala recording over 18 years. The basis of the 18-year period for a koala record was based on the principle of generational persistence (i.e. consistency of koala records within a grid cell over three or more koala generations).

To be genuine and acting in good faith it should be 3 records in an 18-year period that demonstrates persistence, not just one sighting of a koala passing through once in 18 years.

Submission

The Koala SEPP 2019 defines 'core koala habitat' as

core koala habitat means—

(a) an area of land where koalas are present, or

(b) an area of land—

(i) which has been assessed by a suitably qualified and experienced person in accordance with the *Guideline* as being highly suitable koala habitat, and

- (ii) where koalas have been recorded as being present in the previous 18 years.

The draft *Guideline* states several things concerning ‘core koala habitat’:

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Part 1.6

Core koala habitat

Core koala habitat as defined in the SEPP informs the plan of management and development assessment process. When core koala habitat is mapped through approved KPoMs, the GIS data for any core koala habitat identified under the plan must be submitted to the Department. **This data will be used to update the Native Vegetation Regulatory Map** under the *Local Land Services Act 2013* and the Biodiversity Values Map made under the Biodiversity Conservation Regulation 2017.

KPoMs identify core koala habitat through applying the survey methodology at Appendix C.

Councils will establish provisions for core koala habitat in their KPoMs which relevant development applications must comply with in order to be approved.

Alternatively, on land where there is no approved KPoM, if a landholder wishes to conduct a survey in accordance with Appendix C, rather than using the Koala Development Application Map, the survey will examine the land for the presence of core koala habitat.

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Appendix C: Survey Methods of Core Koala Habitat

Notes about the definition:

1. “An area of land” includes both a development footprint and the broader area of land on which the development is proposed (i.e. the subject lot). The controls within the SEPP apply to both direct and indirect impacts and all habitat on the site area therefore needs to be considered **even if no vegetation is to be cleared**.

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Part B (second limb of the definition of core koala habitat)

- i) Presence of highly suitable koala habitat^[SEP] The native vegetation of the site area must be mapped into Plant Community Types (PCTs) based on a full floristic survey following Sivertsen, 2009, *Native Vegetation Interim Type Standard*.

Each PCT then must be sampled individually for the presence of koala use trees ...

A suitable sampling method must be used to enable the tree species composition of each PCT (on average) to be calculated. A number of methods can be used dependent on size of the site area, tree density and uniformity of vegetation. These are:

- Quadrants can be selected within each PCT either randomly or along a selected transect. Quadrants need to be of sufficient size to enable a minimum of at least 20 trees to be counted (at least 20 x 20 metres) and of sufficient number to allow a robust statistical determination of the percentage of tree species present in the lower, mid and upper stratum. The number and size of quadrats chosen will depend on the size of the site and the vegetation present and must be justified in the koala assessment report. [L]
[SEP]
- Transects can be randomly selected through each vegetation unit, identifying and counting all trees within a selected distance either side of the transect line (usually 20 either side). Transects need to be of sufficient length to sample enough trees to allow a statistical determination of the percentage of tree species present, with a minimum of 100 trees if present. The number and length of transects chosen will depend on the size of the site area and the vegetation present and must be justified in the koala assessment report. [L]
[SEP]

Results of the sampling within each PCT must be shown separately and not summed for the overall site. Where 15% or greater of the total number of trees within any PCT are the regionally relevant species of those listed in Schedule 2 (see Appendix A), the site meets the definition of highly suitable koala habitat.

If highly suitable koala habitat has been established (via the above survey), the presence or past records of koalas must also be established.

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ii) Koala records

In addition to site surveys, there must also be a consideration of existing records spanning the previous 18 years (3 koala generations). The site area is considered to contain habitat that meets the definition of core koala habitat, provided the site contains highly suitable koala habitat (identified via the above survey) and where a record or records exist within the last 18 years, within the following maximum distances from the site:

- 2.5 kilometres of the site (for North Coast, Central Coast, Central Southern Tablelands, South Coast KMAs) [L]
[SEP]
- 5 kilometres of the site (for Darling Riverine Plains, Far West, North West Slopes, Riverina, Northern Tablelands KMAs) [L]
[SEP] These distances reflect the estimated median home ranges of koalas within coastal and inland locations. [L]
[SEP]

...

Where core koala habitat is identified, the assessment report and maps of core koala habitat (in a GIS data format) must be provided to the Environment, Energy and Science Division of the Department of Planning, Industry and Environment for updating the Biodiversity Values Map and Category – 2 Sensitive regulated land on the Native Vegetation Regulatory Map and any koala and flora survey records are to be added to the NSW BioNet. [L]
[SEP]

Two comments are made.

The basis of the 18-year period for a koala record was based on the principle of generational persistence (i.e. consistency of koala records within a grid cell over three or more koala generations). To be genuine and acting in good faith it should be 3 records in an 18-year period that demonstrates persistence, not just one sighting of a koala passing through once in 18 years.

The updating of the Biodiversity Value Maps illustrates that this is not planning and assessment policy.

Species List and Plant Community Types (PCT)

Summary

These 123 tree species represent 367 indicator species and 1098 common associate species of the 152 Eucalypt and Related Forest Types known to occur in NSW (*Research Note No. 17; Forest Types of NSW*. Baur, G.N. *et al*, 1989). Indicator species are the dominant tree species for which the forest type is so named. As shown by the Site Identification Map, by broadening the list of tree species out to 123, the likelihood is that the **all forested areas in NSW will be classified high quality koala habitat**.

Submission

The decision in the SEPP to expand the number of tree species upon which koalas depend (from 10 to up to 65) was based upon *A review of koala tree use across New South Wales* (OEH 2018). This Review has some fundamental limitations, which are acknowledged in part by the authors, but which don't appear to have been considered by in the SEPP Guideline. A summary of the Review's limitations are as follows (our emphasis):

- i. The Review was based on qualitative not quantitative data. This is acknowledged in the report:
 - *Evidence of koala tree use was sourced from written reports and published research articles concerning koala habitat, as well as from personal communications with koala experts and koala carers.*
 - *Sampling biases, taxonomic and field identification issues and interpretations are acknowledged as inherent limitations; ...*
- ii. No truly independent scientists were involved in the Review and there was no independent peer review. The Review was conducted by OEH (EES) staff with peer review of the manuscript also by OEH staff. All people whose contribution to the Review was 'Acknowledged' are known passionate advocates of the koala and some are known advocates of the Great Koala National Park. For such an important and influential study more independent oversight would have been appropriate.
- iii. The Review did not determine the type of use of different tree species or the ability of other species to fulfil the same role.
 - *This review concerns evidence of koala tree use, **for whatever purpose**, across New South Wales*
 - *The review identified evidence of koala use for 137 tree species across New South Wales.*
- iv. The Review acknowledged the need for further consideration of the 'tree use' issue however this did not occur in any transparent way before the SEPP was finalised.

- *however, the trends and patterns revealed in this review offer a consolidated basis **for further consideration of koala tree and habitat requirements** at regional and state-wide scales*
- v. The Review applied subjective bias in its classification of koala tree use.
- *In deriving use levels for tree species within each KMA **the highest designated use level was adopted as the regional level** (p11).*
 - *Tree use levels designated in this review **reflect the author's informed interpretation** and standardisation of the sourced evidence, moderated or **influenced by the opinions** of local koala experts (p11).*
 - ***While purely descriptive and arbitrary, these thresholds and ranks are considered adequate** for the designation of relative koala tree use levels for the purposes of feeding, shelter and social needs (p 11).*
- vi. The Review classified the use of tree species by koalas into four categories - *high, significant, irregular and low*. The list of 137 tree species is made up of species from all four levels. In the SEPP their list of species has been reduced to 65 however there is no differentiation into categories.
- vii. The Review openly acknowledges that what constitutes koala use of an individual trees can be almost anything (i.e. it can be purely incidental or for no particular purpose).
- *It is worth emphasising up-front that koala use of individual trees or tree taxa (species, subgenera and genera), **for whatever purpose** (e.g. feeding, shelter, social needs), might reflect any, or a combination, of the following:*
 - *Targeted selection of the tree or tree taxon, as a food, shelter or other resource.*
 - *Incidental use as a result of the tree's, or tree taxon's, association or co-occurrence with favoured trees, or tree taxa. This relates to the concept of 'palatability mapping' and 'palatable neighbourhoods' for koalas, whereby some trees and tree species may be utilised coincidentally, due to the presence of a subset of preferred feed trees (e.g. Moore and Foley 2010).*
 - *Coincidental prevalence or abundance of a tree taxon within locally or regionally suitable koala habitats. This aspect might reflect koalas' familiarity with certain species leading to an elevated propensity to use those species simply in line with their frequency of encounter (p13).*

The manner in which the Review findings have been adopted by the Department in its drafting of the SEPP Guideline is extremely concerning. In simple terms the SEPP Guideline cherry-picked from the Review in order to achieve the broadest possible definition of koala habitat.

Most concerning is the way the SEPP Guideline has redefined the concept of 'koala tree use (for whatever purpose)', to mean 'highly suitable koala habitat'. No explanation or justification is provided by the Department for this change.

In the Department's determination to reclassify everything as 'highly suitable', the concepts of 'moderately suitable habitat' and 'low suitability habitat' have become superfluous. Prior to the SEPPs gazettal these terms were commonly used as it was

recognised that not all koala habitat was equal. Now the terms are being treated as 'inconvenient truths' which no longer appear in the Department's vernacular.

In the draft SEPP Guideline there is a heavy reliance on the mapping of vegetation types (PCTs) to define 'highly suitable koala habitat' - *Each PCT.. must be sampled individually for the presence of koala use trees*. This is surprising as by the Department's own admission PCTs are not sufficiently accurate to be relied upon for the purpose proposed by the SEPP Guideline. The following are statements made on the Department's website (our emphasis).

(<https://www.environment.nsw.gov.au/research/PCTfaq.htm>)

- *the PCT classification is relatively immature and will need to undergo further refinement before all communities are defined to a minimum standard needed for vegetation mapping. **Many plant communities, particularly on the east coast, are still poorly defined.***
- *The PCT classification has been developed from a variety of classification sources, so the completeness of PCT attribution varies across the state. As a general rule, PCT classifications derived solely from BioMetric Vegetation Types (BVT) **will not meet the minimum attribution level required for vegetation mapping.***
- *Based on these factors, **the PCTs east of the great divide are generally not suitable for mapping at this stage as most PCTs fall below the desirable 80% mappable threshold for both factors.***

By changing the definition of important things, the Department has been able to ignore subtle but important differences in the evidence.

The way the PCT maps are to be applied is a case in point. The draft SEPP Guideline specifies that to be 'highly suitable koala habitat' only 15% of the tree species in a PCT need be from those listed.

- *Where 15% or greater of the total number of trees within any PCT are the regionally relevant species of those listed in Schedule 2 (see Appendix A), the site meets the definition of highly suitable koala habitat.*

The origins of the 15% rule are understood to be based on a large habitat mapping study commissioned by the NSW EPA (2016) on NSW State forest². This study found that *overall koala numbers... were most abundant in habitat areas with greater than 15% local koala feed trees in the canopy*. The key point here is that the reference of 15% is to 'feed trees' not to tree used by koalas (for whatever purpose). The SEPP's loose interpretation of the evidence extends to the size of trees. Under the 15% rule it requires that all trees (with a diameter at breast height over bark (DBHOB) of 10 cm or greater) be counted. This is contrary to the EPA study which found that the 15% rule only applied to 'trees in the canopy'.

Commentary on Consultation

Summary:

The consultative process with the Koala SEPP and the Guideline has been a sham.

What consultation has been undertaken amounts to an avoidance of proper scrutiny and industry comment.

² NSW EPA (2016) Koala Habitat Mapping Pilot NSW State forest

The process allegedly built into the adoption of a Koala Plan of Management is of the same calibre. It is, in reality, a farce with the odds both resource wise and financially stacked against the landowner.

It is a process that will in performance, and in spite of any description of the process, as the Minister keeps lauding, ensure that the objective of closing down regional areas to private native forestry operations will occur.

It will also have the outcome that land zoned RU1 and RU2 will become an E zone land which over time will revert to unmanaged wildness with pests and weeds just like the State National Parks.

Submission

Whilst the time for the consultation on the *Guideline* was extended to 30 March 2020, then 6 April, from a previously impossible short timeframe, is only illustrative of the reluctance to consult generally on the whole issue of the Koala SEPP 2019.

Industry briefings did not occur before the gazettal of the SEPP.

Briefings for the Environment lobby industry did.

On 28 February 2020 there was an industry briefing at the Department of Planning Industry and Environment at Parramatta. The Koala SEPP 2019 became operational on 1 March 2020.

The briefing was held on the last working day before the statutory instrument became law!

At the briefing there were only two industry representative bodies: NSW Farmers and Timber NSW. This only occurred probably due to political pressure bought by the junior Coalition member, the Nationals. Not because it was the correct process or because it was the Minister's direction.

At the briefing no copy of the statutory instrument was provided.

This is an extremely low point for the introduction of statutory instruments in NSW.

The question has to be asked, why and what is the ultimate agenda?

Part 3 of the Environmental Planning and Assessment Act 1997 has to do with Planning Instruments. Division 3.2 deals with Environmental planning instruments. In particular, section 3.30 is worth noting:

3.30 Consultation requirements

(cf previous s 38)

- (1) Before recommending the making of an environmental planning instrument by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary—
 - (a) to publicise an explanation of the intended effect of the proposed instrument, and
 - (b) to seek and consider submissions from the public on the matter.

There was no opportunity for the public to make submissions on the final draft of the Koala SEPP 2019.

So why did the Minister exercise his discretion under section 3.30 in the negative?

It is quite apparent that the Government, EES of DPIE or DPIE did not believe that such consultation was appropriate.

The meeting held the day before the commencement of the Koala SEPP 2019 did not include industry bodies that had a connection with land management and were possibly impacted by the Koala SEPP 2019:

- Real estate,
- Stock and Station Agents,
- Property Council for regional development with land over 1 hectare
- the Law Society for conveyancers of regional properties over 1 hectare,
- the Minerals Council (as the Koala SEPP 2019 has an inconsistency with the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007),
- Consulting Surveyors,
- Plantation owners and others

This is highly objectionable and displays an arrogance and contempt for the general public which this Government and Public Service are meant to serve.

The bureaucracy is acting as the government and will do whatever is required to achieve their agenda. It lacks transparency, suggests secrecy and results in impractical ideologically driven legislative drafting, that can and does destroy business, employment, communities and people's lives.

This is achieved by a public service that have a guaranteed salary and superannuation who should serve the public interest not their own agenda.

Consultation on the *Guideline*

Process of consultation with the *Guideline* itself is just as arrogant and contemptible.

There is no provision for any consultative mechanism in the definition or the *Guideline* in the event that the Environmental Agency (EES) wishes to alter the terms of the *Guideline* in the future.

Any plain language reading of the definition taken from Clause 1.1 of the Koala SEPP 2019 provides for no opportunity for public comment 'from time to time' or on material as 'published on a publicly assessed website'.

The *Guideline* was provided on 27 February 2020 by email from Department of, Planning Industry and Environment. Thirty nine (39) recipients of the email were to members of the NSW Public Service, four (4) industry representative were recipients (the ones which attended the meeting on 28 February 2020 at Parramatta) and four (4) environmental group representatives.

Three days before the commencement of the Koala SEPP 2019.

The Minister for Planning Industry and Environment in an undated letter (received on 23 March 2020) by a NSW resident and clearly prepared by the public service has written:

While the Department of Planning, Industry and Environment (the Department) has collaborated closely with Local Land Services (LLS) in preparing the draft *Guideline* and LLS has represented the views of stakeholders, including agriculture and private native forestry during this time,

I agree it would be beneficial to publicly exhibit the Guideline to give all stakeholders the opportunity to comment.

Again, a further example of DPIE displaying their arrogance and insolence that the public service can speak for the views of industry, particularly when they have not consulted them.

The content of the *Guideline* simply does not support the contention that Local Land Services (LLS) was able to represent the views of stakeholders. There is little in the *Guideline* that holds any content that impacted stakeholders could or would support despite being actively involved in conservation of Australian flora and fauna.

The Minister signs off in the same letter, material which touches on 'consultation':

The new Koala SEPP also introduces a referral role for LLS, within the Coordinator General of Regions, Industry, Agriculture and Resources' remit, before the Secretary of the Department considers a KPoM for approval. The Guideline explicitly encourages consultation with Environment, Energy and Science division (EES) and LLS throughout the development of a KPoM.

This statement is 'bureaucracy speak' at its worst. Anyone who has dealt with the consultation process under this Government and some parts of the current NSW Public Service, knows that interdepartmental consultation, particularly in the clusters, is simply not effective. As far as the Environmental Agency (EES) is concerned the 'end justifies the means'.

The NSW public service operates in silos. Despite the formation of clusters, it has not worked in practice. The silo that dominates and intimidates is the Environmental Agency (EES) and particular sections and individuals within it.

The legislative system akin to "snakes and ladders", operating around land management in NSW is an example of this. The Koala SEPP 2019 undoes all the program of work of the last 10 years. It effectively brings land into a category2: sensitive regulated land in the Native Vegetation Regulatory Map regime. Again, the end justifies the means!

The Ministerial letter moves on to consultation at a Council level and we quote it in full:

I confirm the new Koala SEPP introduces rigorous consultation requirements for councils preparing KPoMS, similar to the requirements for a major planning proposal under the Environmental Planning and Assessment Act 1979. The Koala SEPP requires councils exhibit the KPoM for a minimum period of 28 days, serve notice to all landholders in proposed core koala habitat and inform landowners of the implications of such a designation of the KPoM is approved. During a council's exhibition of a KPoM, all stakeholders including government agencies can make a submission.

This Guideline also requires councils to make it clear to landholders the process for contesting core koala habitat on their land, which will involve a survey undertaken by a suitably qualified and experienced person using the technology outlined in the Guideline.

The Guideline requires Councils to detail any objections to core koala habitat received as submissions during exhibition, and council's response, including any evidence considered (such as a survey) and a justification for the final decision. Councils will be required to provide a copy of their submissions report to the Department to inform the Department's assessment of the KPoM

and will also be available to EES and LLS to comment on as part of their KPoM referral role.

None of these stated measures have any guarantee that an consultation will work effectively and in good faith. What will work is the landowner will have to pay an inordinate amount of money to set aside assumptions which are not based on fact.

Instead what has to be set aside is the circumstances where assertions held by EES, can be set aside without cost to landowner, otherwise EES will ensure their agenda prevails. All of this currently at the expense of the landowner.

Indeed, the EES can put in a submission to its own decision making process. How ludicrous is that in a process that is allegedly required to have procedural fairness and principles of natural justice and based on balanced decision making principles.

This is not consultation.

The penultimate paragraph of the Minister's undated letter states:

The Department is reviewing five draft KPoMs which the relevant councils had already exhibited for public comment. The LLS has reviewed these KPoMs and no proposed core koala habitat identified in these draft plans has been found to impact current PNF plans.

This single paragraph demonstrates the sham consultative process and the lack of transparency in this entire policy area.

The Five draft KPoMs were under SEPP44. It is not possible for it be otherwise. The commencement date of the Koala SEPP 2019 is 1 March 2020. The SEPP requires 28 days notification through public exhibition for a proposed SEPP. At the date the (undated) letter was prepared 28 days had not lapsed. This is not possible on any timeline given March has 31 days.

To be otherwise this assumes that the relevant Council had knowledge of the template contained in the draft Guideline, completed the necessary work, had a resolution through Council before the SEPP was operational and all completed over the Christmas 2019 period when Councils go into recess. Yet the letter infers that the relevant SEPP is the Koala SEPP 2019.

The reference to the role of LLS is also very misleading. What LLS reviewed is current PNF plans. Current plans would not impinge on core koala habitat. If they did there would be no approved Plan. Whoever wrote the draft for the Minister should reread the Local Land Services Act and the Codes of Practice for Private Native Forestry.

The paragraph signed off by the Minister can only make sense if the names of the councils or the locations of the proposed KPoMs are identified.

The content of the Minister's letter is now called into question. At law and in the commercial world it is referred to as 'misleading and deceptive' or misrepresentation of the facts.'

Reference to the Ministerial Directive 2.6 in the *Guideline* without the Ministerial Direction 2.6 having been issued, is another example of the sham consultation.

How do you offer the opportunity to consult when a key part of the administrative mechanism (not Parliamentary) is missing?

Guideline not a statutory rule

Summary

The Guideline is not a statutory rule. It is not a regulation, by-law, rule or ordinance. It is a Public Service device that can be altered at will and has no Parliamentary or ministerial oversight. It has the potential to have KPoMs deny any effective land use on any land subject to a KPoM. There would be no capacity to challenge this save through an expensive Court case beyond the reach of a vast majority of landowners impacted.

That the Guideline is a substantial document prepared and approved by the Department of Planning, Industry and Environment without review is deliberate as it removes any oversight by Parliament.

The Guideline is a document that should have the oversight of the NSW Parliament as that would require consultation, cost and benefit analysis, alternative options canvassed and a full and proper assessment of the benefit and cost to business and community. Much in line with what is contained in the Legislative Review Act. The Government has literally ignored these requirements.

It is not an even handed approach. There is no respect for the law or its application. Again, it appears the end justifies the means!

Submission

Pursuant to the *Environmental Planning and Assessment Act 1979* The Guideline is neither a regulation, by-law, a rule nor an ordinance. It is not made by the Governor or approved or confirmed by the Governor. This is clear from the definition of the term *Guideline*.

The Environmental Agency (EES) needs to demonstrate just how the *Guideline* is the law of NSW. The Head of the Environmental Agency (EES) stating it is so, is not good enough. The proper legal advice should be published, in such a form that it can be properly tested.

The Governor did approve the definition of the Guideline in the SEPP. However, the Governor does not approve the actual contents of the Guideline. There does not appear to be the capacity for this in the EPA Act. The EPA in respect to State Planning Policies does not permit regulations, rules, by-laws or ordinances to be generated to support a State Environmental Policy.

Guideline is defined in the Koala SEPP 2019³ as:

Guideline means the guideline titled *Koala Habitat Protection Guideline* prepared by the Department of Planning, Industry and Environment, approved by the Planning Secretary and published on a publicly accessible website maintained by the Department and as in force from time to time.

Note the Governor does not make or approve the Guideline, the Department of Planning, Industry and Environment do.

The Governor makes a SEPP. This is set down by Parliament in Section 3.29 of

³ Clause 1.1 of the draft Koala SEPP 2019

Division 3⁴ of the *Environmental Planning Assessment Act*. A SEPP can be for any region which might be any area of the State (other than the Greater Sydney Region).⁵

So where might the *Guideline* fit? Where are they authorised by Parliament?

- Section 3.29(2) provides the Minister with certain authority approved by the Governor. Therefore, it does not fall within this direction by Parliament.
- Section 3.12 of the *Environment Planning and Assessment Act 1979* that authorises regulations relating to strategic planning does not authorise the *Guideline*.

Commentary in Herzfeld and Prince, *Statutory Interpretation Principles (2014)* makes it very clear that 'legislation is subordinate, if it owes its existence and authority to other legislation, if it does not, it is primary'

The problem the Government faces is how the *Guideline* works within the Environmental Planning and Assessment Act, the primary legislative instrument. The *Guideline* is clearly defined and this is 'made' by the Governor. The Governor does not 'make' the contents of the terms of the *Guideline*. The legislation establishing the 'primary' instrument does not make provision for Regulations, Rules, By-laws or Ordinances to be made in support of the State Planning Policy by another body. The literal reading of the relevant legislation is the Governor must make the terms and contents of a State Planning Policy.

So, what is the *Guideline*? Referencing Herzfeld and Prince (p.293) and characterising the *Guideline* as setting out 'the procedure or process' of the Koala SEPP 2019, then it is the form of statutory rules. This is relevant as the Planning and Environment Court has held that a DCP (Development Control Plan) is a policy document because it sets out the policy of zoning regulations contained in the Local Environment Plan of a Council area. Certainly section 3.42 of the Environmental Planning and Assessment Act, which sets out the purpose and status of development and control plans provides that 'the principal purpose of a development control plan is to provide guidance'. It is possible to see guidance' as 'policy'.

However, there is a fundamental distinction, the *Guideline* is not a DCP.

The Court ruling in making 'guidance' is a matter of policy and cannot be applied to the making of legal form applicable to the *Guideline*. To do so is the hallmark of an 'activist' mindset that is not applicable to the administration of the law of NSW. It is the Parliament that must be the 'activist' not the bureaucracy tasked with administering the Parliament's direction, not the Government's or Executive's direction. The Executive has to obtain parliament's direction.

Therefore, what is the *Guideline*? At best it can only be an administrative aide with NO legal force. Is this why there is no consultative provision in respect to any future alteration the document?

There can be no Ministerial direction under section 3.30 of the Environmental Planning and Assessment Act 1997 into its preparation, approval and maintenance 'from time to time'.

There is nothing in the *Guideline* that reflects the spirit of what Schedule 1 and 2 of the Subordinate Legislation Act seeks to achieve. It is Parliament's wish and direction with secondary or subordinate legislation that is what the *Guideline* seeks to be without authority. This really means the Department of Planning Industry and

⁴ <https://www.legislation.nsw.gov.au/#/view/act/1979/203/part3/div3.3/sec3.29>

⁵ Section 3.2, Environmental Planning and Assessment Act 1979.

Environment are acting without oversight or parliamentary authority.

The wording of the definition of Guideline confirms this. The bureaucracy prepares, approves and maintains the document. Quite transparent with the apparent approval and support of the Government through the cluster Ministers Minister Stokes, Deputy Premier Barilaro, Minister Kean, Minister Pavey, Minister Marshall and Minister Hancock (prior to 2 April 2020).

Finally, the following piece of journalism although relating to the COVI-19 crisis denotes what the *Guideline* really is.

In an article titled “Beautiful One Day, Police State the Next” published in the Australian Financial Review on 3 April 2020 by John Roskam, and we quote:

“Jonathan Sumption, a former judge on the UK Supreme Court, gave an interview to the BBC on Monday in which he warned of the consequences of untrammelled power in the hands of politicians and the police. Everything he said applies to Australia. Of police operating in the UK in the same way as they are in Victoria and New South Wales, Sumption said: “That is what a police state is like. It’s a state in which the government can issue orders or express preferences with no legal authority and the police will enforce ministers’ wishes.

“Yes, this is serious and yes it’s understandable that people cry out to the government,” Sumption said.

“But the real question is: Is this serious enough to warrant putting most of our population into house imprisonment, wrecking our economy for an indefinite period, destroying businesses that honest and hard-working people have taken years to build up, saddling future generations with debt, depression, stress, heart attacks, suicides and unbelievable distress...”

In the context of this note the following. The content of the *Guideline* is not answerable to the public, the business community, the Parliamentarians, the Executive of Parliament, or even the relevant Minister. There is no consultative process. It is made ‘from time to time’ by people who are only answerable to themselves. They make the policy, the decisions that others must abide by.

These unidentifiable and unaccountable bureaucrats have already altered the financial burden in this item of public policy by requiring landowners to pay hundreds of thousands of dollars to undertake the work they should be doing. They have set up a survey regime that if the result that is “wanted” does not result, then the landowner has to repeat it but differently to try and obtain the ‘right answer’ - all at the landholders’ expense.

All of this is in the *Guideline*. Is this not what happens in a police state!

It appears the end justifies the means!

Guideline Stated Aim

Summary

The objective - to ‘encourage the conservation and management of areas of natural vegetation that provide habitat for koalas’ and ‘provide the best

opportunity to deliver strategic conservation outcomes for koala populations in NSW' - fails any practicable test based on land management of the Australian native landscape and what is best for koala habitat and koalas.

The philosophy and ideology, of 'lock it up and leave it' has proven to be in the Australian summer of 2019-2020 on the Eastern seaboard, a spectacular and disastrous result. With an estimate made of more than 10,000 koalas killed due to fires coming out of National Parks in the north and south of NSW the underlying objectives of the Koala SEPP 2019 and *Guideline* must be profoundly questioned and changed.

The Koala SEPP 2019 and the *Guideline* in its current form, will lead to the ultimate destruction of koala populations in their free range. It will have the perverse and reverse objective to that stated.

The *Guideline* says that the 'SEPP is part of the Planning and Assessment Process. This is incorrect. It is so wrong that it is bordering on an act of malfeasance or 'improper purpose'. It is correct to state that the process is disguised as a planning and assessment matter. It is really a matter for the Native Vegetation Regulatory Maps under Part 5A of the Local Land Services Act.

The real objective of the SEPP is to transfer land on which PNF operations occur under Part 5B of the Act, to Part 5A and into Category 2 sensitive regulated land. It should be noted that it is the Environmental Agency (EES) that moves land at its discretion from Category 2 regulated land to Category 2 sensitive regulated land. This is not a planning and assessment matter.

It is not even a planning and assessment matter when the Ministerial Direction 2.6 will direct that Category 2 sensitive regulated land must be zoned Environmental Conservation.

It only becomes a planning and assessment matter when this zoning criterion requires a development application to do anything at all.

Submission

Koala SEPP 2019 and *Guideline* objectives

Clause 3 of the *State Environmental Planning Policy (Koala Habitat Protection) 2019* has as its objectives the following principles:

- to encourage the conservation and management of areas of natural vegetation
- that provide habitat for koalas to support a permanent free-living population
- over their present range, and
- reverse the current trend of koala population decline.

Clause 1.1 of the draft *Guideline* sets out the aim of the SEPP again!

- seeks to address the declining status of koalas in NSW through better conservation and management of koala habitat
- habitat as **part of the planning and assessment process**.
- The aim of the policy will be achieved through this *Guideline* by
 - defining what constitutes core koala habitat. [L] [SEP]
 - outlining the circumstances where a consent authority must have regard to the [L] [SEP] matters set out in the guideline. [L] [SEP]

- encouraging the development of Koala Plans of Management (KPoMs). These plans provide the best opportunity to deliver strategic conservation outcomes for koala populations in NSW. They play a critical role in helping to understand koala values at a landscape scale and avoiding the types of issues that can arise through site-based, incremental impacts, such as the loss of important habitat linkages, or intensifying land use within areas that are likely to lead to population decline. [SEP]
- requiring that a consent authority's determination of a development application is consistent with a KPoM or Part 3 of this Guideline where there is no KPoM. [SEP]

Part of the planning and assessment process

The *Guideline* says that the 'SEPP is part of the Planning and Assessment Process. This is incorrect. It is so wrong that it is bordering on an act of malfeasance or 'improper purpose'. It is correct to state that the process is disguised as a planning and assessment matter. It is really a matter for the Native Vegetation Regulatory Maps under Part 5A of the Local Land Services Act.

The real objective of the SEPP is to transfer land on which PNF operations occur under Part 5B of the Act, to Part 5A and into Category 2 sensitive regulated land. It should be noted that it is the Environmental Agency (EES) that moves land at its discretion from Category 2 regulated land to Category 2 sensitive regulated land. This is not a planning and assessment matter.

It is not even a planning and assessment matter when the Ministerial Direction 2.6 will direct that Category 2 sensitive regulated land must be zone Environmental Conservation.

Since 2017 all clearing in E zones is now managed under the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*. Under this Vegetation SEPP, all clearing of native vegetation on land that is part of Core Koala Habitat must now be approved by the Native Vegetation Panel and offset in accordance with the biodiversity offset scheme. So the farmer/forester would need to first retain an accredited ecologist to carry out a biodiversity assessment in accordance with the Biodiversity Assessment Methodology (BAM)), and if the land management/clearing was approved by the Panel the farmer/forester would need to purchase offset credits or establish and manage a perpetual offset site on their own land at the offset ratio calculated by the BAM. DAs that deal only with clearing of native vegetation are no longer permitted (although clearing may be approved as part of a DA for other development).

There is a limited exception for the requirement for approval for land management activities in E zones, which allows landholders to carry out the Routine Agricultural Management Activities (RAMAs) that used to be permitted under the *Native Vegetation Act* (see cl 27 of the Vegetation SEPP). But this exemption expires on 25 August 2020, so it will not be likely to of benefit to farmers or foresters (since the movement of land into E zones will take a few months after the KPOM is made). If land is not moved into an E zone, farmers will be able to continue to obtain the benefit of the limited suite of 'allowable activities' permitted under Schedule 5A of the Local Land Services Act 2013. But the majority of these 'allowable activities' are NOT permitted on land that has been identified as 'Category 2 – Sensitive Regulated Land' (which includes land identified as Core Koala Habitat under a KPOM).

At least one section of the draft *Guideline* is accurate and factually based, Clause 1.7 *Legislative Framework*. It supports the proposition just outlined that it is a Local land Services Act matter and not an Environment Planning and Assessment Act issue.

It is not easy to ascertain the law and understand how it operates. It has been referred to as an exercise in a game of ‘snakes and ladders’. **This is probably more an exercise of concentration obdurate obfuscation** on behalf of the drafting agency, probably EES, formerly OEH, to ensure that through the twists and turns of the statutory instruments and statutory rules what the Government policy was seeking to achieve was reversed, as the Government’s policy did not meet the ideology of the public service working on the policy.

The end justifies the means, again!

In Schedule 1, is an analysis of the snakes and ladders law for those who doubt this is what it is and that there is doubt about the reversal of Government policy to assist private native forestry as was allegedly decided by Cabinet in the last Government. When Cabinet agreed to de-couple PNF. Something the Environmental Agency (EES) has failed to act upon, if indeed Cabinet made the decision.

Summary of the Law as at 1 March 2020 that impacts on private native forestry operations if a KPoM is adopted over the land on which the operations are to occur.

Clause 111 of the Local Land Services Regulation places land on which is subject to a KPoM into category 2 – regulated land for the purposes of the native vegetation regulatory maps.

Clause 108 of the Local Land Services Regulation gives the Environmental Agency (EES) Head the authority to place land subject to a KPoM that is native vegetation regulated land into Category 2 sensitive regulated land.

Section 60(2)(f) of the Local Land Services Act provides that land which is subject to a requirement to ‘protect the biodiversity values of the land under the Biodiversity Conservation Act will be ‘regulated lands’.

Schedule 1

To further illustrate the statement that it is a planning and assessment matter a full review of the adoption of a core koala habitat on a private native forest operation is set out.

Native vegetation regulatory maps and the various categories given to land.

The Local Land Services Act regulates land through maps called ‘Native vegetation regulatory maps’ section 60E of the Local land Services Act)⁶. The maps have statutory categories which are partially set out in this section:

- Where the clearing of native vegetation is not regulated under this Part (Part 5A) (category 1 – exempt land) and
- Where the clearing of native vegetation is regulated under this part (category2-regulated land), and
- Here the clearing of native vegetation is regulated under this Part but (because of its vulnerability) is subject to additional restrictions and extended to the clearing of dead and non-native plants (category 2- vulnerable regulated land).

Section 60G (3) of the Local Land Services Act⁷ provides:

⁶ <https://www.legislation.nsw.gov.au/#/view/act/2013/51/part5a/div2/sec60e>

⁷ <https://www.legislation.nsw.gov.au/#/view/act/2013/51/part5a/div2/sec60g>

60G Responsibility for preparation and publication of maps

- (3) A native vegetation regulatory map may designate—
 - (a) category 1-exempt land, and
 - (b) category 2-regulated land (including category 2-vulnerable regulated land), and
 - (c) any other sub-category prescribed by the regulations.

Clause 108 of the Local Land Services regulations provides:

108 Additional sub-category of regulated land: category 2-sensitive regulated land (s 60G (3) (c))

- (1) A native vegetation regulatory map may also designate category 2-sensitive regulated land as a sub-category of category 2-regulated land.
- (2) Land is to be designated as category 2-sensitive regulated land if the Environment Agency Head reasonably believes that—
 - (a) the land is required to be designated as category 2-regulated land by section 60I (2) (f) of the Act (that is, because the land is in an area that is or was subject to a requirement to take remedial action to restore or protect the biodiversity values of the land under Part 5A of the *Local Land Services Act 2013*, the *Biodiversity Conservation Act 2016*, the *National Parks and Wildlife Act 1974* or the *Native Vegetation Act 2003* before its repeal) but only for the period during which that requirement is in effect, or
 - (b) the land is required to be designated as category 2-regulated land by section 60I (2) (c), (d) or (g)–(m) of the Act,

To understand clause 108(2)(a) section 60I(2)(F) of the Local Land Services Act is set out:

60I Category 2-regulated land mapping

60I (2)(f) (f) the land is or was subject to a requirement to take remedial action to restore or protect the biodiversity values of the land under this Part or the *Biodiversity Conservation Act 2016* or under the *Native Vegetation Act 2003* or the *National Parks and Wildlife Act 1974*,

The key phrase here is ‘protect the biodiversity values of the land under this Part or the *Biodiversity Conservation Act 2016*’.

The draft *Guideline* advises:

How core koala habitat is treated under the SEPP

Core koala habitat

Core koala habitat as defined in the SEPP informs the plan of management and development assessment process. When core koala habitat is mapped through approved KPoMs, the GIS data for any core koala habitat identified under the plan must be submitted to the Department. This data will be used to update the Native Vegetation Regulatory Map under the *Local Land Services Act 2013* and the Biodiversity Values Map made under the Biodiversity

And Clause 108 (2) of the Local Land Services Regulations authorises the staff under the direction of the 'Environmental Agency (EES) Head' to designate land subject to a KPOM as 'category 2 – sensitive regulated land'.

It is noted that:

Section 60I (2) (j)⁹ The Local Land Services Act 2013, Part 5A Land Management (native vegetation) provides:

60I Category 2-regulated land mapping

(2) Land is to be designated as category 2-regulated land if the Environment Agency Head reasonably believes that—

...

(j) the land is identified as koala habitat (of a kind prescribed by the regulations) in a plan of management made under *State Environmental Planning Policy No 44—Koala Habitat Protection*,

Local Land Services Regulation 2014, Part 14, Division 2 'Native vegetation regulatory map', clause 111¹⁰:

111 Core koala habitat to be designated as category 2-regulated land (s 60I (2) (j))

Koala habitat that is to be designated as category 2-regulated land is land identified as koala habitat under a plan of management approved under *State Environmental Planning Policy No 44—Koala Habitat Protection*, being land that in the opinion of the Environment Agency Head is core koala habitat.

Both section 60I (2)(j) and Regulation 111 place land subject to a Koala Plan of Management established under the Koala SEPP 2019 as 'category 2- regulated land'.

Whilst the legislation and its subordinate legislation state the land subject to a KPOM will be category 2 regulated land this is overridden by what is in Clause 108 of the Land Services Regulation as it gives to the Environmental Agency (EES) the authorisation to re-categorise the land as 'sensitive land' from 'regulated land' which is referred to as a sub-category of 'regulated land'.

Effect of Land being classified 'category 2 sensitive regulated land'

The effect of this is found in section 60Q (2) of the Local land Services Act¹¹:

60Q Allowable activities clearing—Schedule 5A

- (1) Schedule 5A sets out the clearing of native vegetation in regulated rural areas for allowable activities that is authorised without any approval or other authority under this Part for the clearing.
- (2) Schedule 5A does not permit clearing or any other activity—
 - (a) without an approval or other authority required by or under another Act or

⁸ Draft Guideline, clause 1.6, page 5

⁹ <https://www.legislation.nsw.gov.au/#/view/act/2013/51/part5a/div4/sec60q>

¹⁰ Local Land Services Regulation 2014, Part 14, Division 2 'Native vegetation regulatory map', clause 111

¹¹ <https://www.legislation.nsw.gov.au/#/view/act/2013/51/part5a/div4/sec60q>

- another Part of this Act (or in anticipation of the grant of any such approval or other authority), or
- (b) in contravention of any provision of or made under (or in contravention of any agreement made under) another Act or another Part of this Act.

Clause 34 and 35 of Part 4 of this Schedule ‘Special provisions applying to category 2-vulnerable regulated land and category 2-sensitive regulated land etc’ provides (emphasis added)¹²:

Schedule 5A

Part 1 Preliminary¹³

1 Application

- (1) This Schedule sets out the clearing of native vegetation for allowable activities that is authorised without any other approval under Part 5A of this Act in a regulated rural area (that is, an area of the State to which that Part applies that is category 2-regulated land on the native vegetation regulatory map).

...

34 Application

- (1) **This Part sets out—**
 - (a) the only clearing of native vegetation (and of dead and non-native vegetation) that is authorised on category 2-vulnerable regulated land, and
 - (b) **the only clearing of native vegetation that is authorised on category 2-sensitive regulated land** and other land on which the clearing of native vegetation is excluded by the regulations under section 60S (2) of the Act from the clearing authorised by a land management (native vegetation) code,

.....

5 Clearing that is authorised

- (1) The clearing of native vegetation for allowable activities under the other Parts of this Schedule does not apply to the clearing of native vegetation—
 - (a) on category 2-vulnerable regulated land, or
 - (b) that is excluded by the regulations under section 60S (2) of the Act from the clearing authorised by a land management (native vegetation) code, or
 - (c) on category 2-regulated land (other than land that is category 2-sensitive regulated land) that contains either of the critically endangered ecological communities referred to in clause 34 (1) (c),
 and the clearing authorised by this clause applies instead.

(1A) Subclause (1) does not apply to land that is subject to a private native forestry plan other than—

- (a) **land that is subject to a private native forestry plan and designated as category 2-sensitive regulated land**, or
- (b) land that is subject to a private native forestry plan and designated as category 2-vulnerable regulated land, or
- (c) land that is subject to a private native forestry plan and is required to be designated as category 2-regulated land by section 60I (2) (a) (that is, because the land contains native vegetation that was grown or preserved with the assistance of public funds other than funds for forestry purposes), but only for the period during which any obligations attached to the receipt of funding are ongoing, or

¹² <https://www.legislation.nsw.gov.au/#/view/act/2013/51/sch5a>

¹³ <https://www.legislation.nsw.gov.au/#/view/act/2013/51/sch5a>

- (d) land that is subject to a private native forestry plan and designated as category 2-regulated land (other than land that is designated as category 2-sensitive regulated land) that contains either of the critically endangered ecological communities referred to in clause 34 (1) (c).