



8 May 2019

**Modification to Kings Forest Residential Subdivision
Koala Plan of Management (MOD 4)**

1. INTRODUCTION

1. On 18 December 2018, the NSW Independent Planning Commission (**Commission**) received from the NSW Department of Planning and Environment (**Department**) a modification application (**Application**) from Project 28 Pty Ltd (**Proponent**) seeking approval to implement a revised Koala Plan of Management (**KPOM**) and amend the conditions of approval (**Conditions**) for the Kings Forest Residential Subdivision (**Project**) under section 75W of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).
2. The Project is a transitional Part 3A Project under clause 2 of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**Transitional Regulation**), and the Commission is the consent authority in respect of such transitional Part 3A projects under the Minister for Planning's delegation of that function to the former Planning Assessment Commission (**PAC**) by instrument of delegation dated 14 September 2011. The Commission is to be taken to be the same legal entity as the PAC, pursuant to clause 7 of the Transitional Regulation.
3. The ability to modify transitional Part 3A Projects under section 75W (**s75W**) of the EP&A Act is being discontinued, however as the request for this Application was made before 1 March 2018, the provision of Schedule 2 continues to apply.
4. Under the Minister's delegation dated 14 September 2011, the Commission is the consent authority for the Application because the Department received more than 25 submissions from the public objecting to the Application, and an objection was made by Tweed Shire Council (**Council**) in relation to the Application.
5. On 18 December 2018, Professor Mary O'Kane, AC, Chair of the Commission directed Dianne Leeson to nominate members of the Panel to consider this Project due to a potential perceived conflict of interest. Diane Leeson nominated Ross Carter (Chair), Professor Richard Mackay, AM and Catherine Hird to constitute the Commission panel determining the Application.

1.1 Site and Locality

6. The Department's Assessment Report December 2019 (**Department's AR**) stated that the Kings Forest site (**Project Site**) is "approximately 880 ha in area and comprises 19 parcels of land. It is located approximately 15 kilometres (km) south of Tweed Heads, close to the townships of Bogangar, Cabarita Beach and Casuarina". The regional context of the site is demonstrated in **Figure 1** and the local context of the site is shown in **Figure 2**.

7. According to the Department's AR, the Project Site is "surrounded by agricultural and pastoral lands to the north, south and west. Cudgen Lake, wetlands and the Cudgen Nature Reserve border the site to the south and east. Further to the east, on the opposite side of Cudgen Nature Reserve, is the coastal suburb of Casuarina".

Figure 1 – Regional Context of Kings Forest



Source: Department of Planning & Environment's Assessment Report

1.2 Background to the Modification

1.2.1 Concept Approval

10. The Department's AR stated that *"on 19 August 2010, the then Minister for Planning approved a Concept Plan for a residential subdivision on the site. The Concept Approval permits:*
 - *residential development for approximately 4,500 dwellings*
 - *the creation of a town and neighbourhood centre for future retail and commercial uses*
 - *employment lands and community and education facilities*
 - *a golf course, open space, wildlife corridors, protection and rehabilitation of environmentally sensitive land*
 - *water management areas and a lake*
 - *roads and a bicycle and pedestrian network*
 - *the delivery of utility services infrastructure."*

11. According to the Department's AR, the approved Concept Plan (**Concept Approval**) has been modified on six occasions between 2010 and 2018, and *"the Concept Plan (as modified) established an environmental management framework for the site, including measures to mitigate and manage potential impacts on koalas, including:*
 - *the preparation of updated KPOMs for each stage of the development*
 - *the transfer of conservation lands to OEH*
 - *the preparation of annual flora and fauna monitoring reports*
 - *the provision of an east-west wildlife corridor of up to 100 metres (m) wide (with a minimum of 50 m at any one point)...*
 - *traffic and wildlife protection measures, to maintain the safe passage of wildlife between habitat areas"*.

1.2.2 Project Approval

12. The Department's AR stated that on 11 August 2013, the then Planning Assessment Commission approved a Stage 1 Project Application (**Project Approval**) permitting the following works:
 - *"the staged creation of 10 development lots*
 - *bulk earthworks within Precincts 1 and 2 and 4 to 24*
 - *subdivision of Precinct 5 into 376 residential lots*
 - *infrastructure and roadworks along the Kings Forest Parkway and within Precincts 1 and 5*
 - *construction of 2,036 m² of floor space within Precinct 1 for future use as a rural supply building with associated car parking and landscaping."*

The Department's AR stated that the Project Approval *"also includes conditions requiring the Proponent to revise the KPOM to provide the koala offsets outside existing natural regeneration areas and to minimise overlaps between the offsets proposed for the koala, Wallum Sedge Frog and heathland vegetation"*.

13. According to the Department's AR, the Project Approval has been modified on five occasions between 2014 and 2018. The modifications are summarised in **Table 1** below.

Table 1 - Modifications to Project Approval MP 08_0194

MOD	Description	Determination Date
MOD 1	Amendments to the weed management plan, changes to the staging plans for works adjacent to the environmental protection zones, the inclusion of the former Crown reserves into the project area description, and amendments to the conditions of approval to extend the timeframes for submitting the environmental management plans.	16/05/2014
MOD 2	Amendments to the list of definitions in Schedule 1, the introduction of a modified process for bond payments, changes to dust mitigation measures, the inclusion of a new dispute resolution condition, and amendments to the timing of the: <ul style="list-style-type: none"> planting of koala food trees management of the 'Potential Council Land' and 'Future Office of Environment and Heritage (OEH) Land' commencement of baseline environmental monitoring surveying and delineation of the environmental offset areas, the boundaries of the Cudgen Nature Reserve and the SEPP 14 wetlands the submission of audit reports. 	20/11/2014
MOD 3	Amendments to replace the previously approved rural supplies building in Precinct 1 with a service station with associated food and drink premises.	20/02/2017
MOD 5	Modifications to conditions 2, 30, 31, 118, 142, 154 and 157 to permit the construction and operation of a private wastewater treatment plant and associated sewerage supply infrastructure.	Withdrawn
MOD 6	Amendments to conditions to defer the timing for the construction of the roundabout on Tweed Coast Road, correct an error in the description of the inner protection area (IPA) for bushfire management at the service station site, and apply a discount to road infrastructure contributions applicable to development within Precinct 1.	21/12/2017
MOD 7	Amendment to Condition A17 to extend the lapse date to 31 December 2019 and clarify the physical works required to prevent the approval lapsing.	24/05/2018

Source: Department of Planning & Environment's Assessment Report

14. According to the Department's AR, the Project Approval includes "conditions requiring the Proponent to mitigate and manage the potential impacts of the proposal on koalas. Condition 45 of the Project Approval establishes a framework to offset the loss of existing koala food trees on-site. In summary, it requires the Proponent to update the KPOM to ensure koala food trees are planted in the following locations:
- 27 ha off-site within Cudgen Nature Reserve
 - Approximately 6 ha on-site within the required east-west wildlife corridor
 - 54.9 ha on-site, within other suitable locations (in accordance with the approved Koala Compensatory Habitat Area Staging Plan)."

1.2.3 Commonwealth Approval

15. The Proponent referred the proposal to the Commonwealth for assessment under the provisions of the *Environmental Protection and Biodiversity Conservation Act 1999*

(EPBC Act). The Department's AR stated that:

"In May 2015, the Commonwealth authorised the removal of 14.92 ha of koala habitat, subject to the Proponent providing 43.45 ha of compensatory koala habitat, conserving and managing 183.05 ha of existing koala habitat, and preparing and implementing a KPOM (EPBC Approval 2012/6328). The EPBC Approval was subsequently amended on 29 June 2017, to update the terms of approval and increase the amount of compensatory koala habitat from 43.45 ha to 56.71 ha."

1.3 Summary of the Application

16. The Department's AR stated that the Proponent lodged a section 75W Application on 21 June 2017 (**Original Application**), seeking approval to implement a revised KPOM and amend the Project Approval conditions to:
 - *"increase the amount of koala habitat to be removed from the site by from 7.49 ha to 14.92 ha (due to mapping errors)*
 - *remove the requirement to plant koala food trees on a 27 ha parcel of land within the Cudgen Nature Reserve*
 - *provide 56.71 ha, of koala offsets across the site, comprising 2 ha of koala offsets within the required east-west koala corridor and 54.71 ha of koala offsets within other parts of the site*
 - *revise the "commencement of works" definition to provide consistency with the EPBC Act approval for the project*
 - *revise the locations of the koala fencing and fauna underpasses, and amend the timing for the construction of this infrastructure*
 - *remove the requirement to provide traffic calming devices to manage koala movements across the site*
 - *remove references to the KPOM dated August 2012 and replace them with the revised KPOM."*

17. The Department's AR stated that in response to issues raised during the exhibition of the Application, the Proponent formally amended the Application in the Response to Submissions (**RtS**) and RtS addendum. The Application currently before the Commission for determination includes the following:
 - *"reduce the amount of additional koala habitat to be cleared from 14.92 to 8 ha, as less vegetation was identified as koala habitat within the development site;*
 - *amend Condition 45 to require 27 ha of koala food tree planting in Cudgen Nature Reserve or an alternative location approved by the Planning Secretary;*
 - *increase the width of the east-west wildlife corridor from approximately 50 m to 100 m, providing 6.26 ha of on-site offsets;*
 - *increase the proposed on-site offsets from 54.71 ha to 62.51 ha;*
 - *increase the total number of koala food trees from 20,578 to 76,411 trees and increase the proportion of koala habitat from 74 % to 95 %;*
 - *amend the fencing details and provide seven koala culvert crossings and one "cattle grid" to manage koala movements across the site; and*
 - *correct administrative errors in the numbering of conditions 148 and 149."*

Table 2 below demonstrates how the KPOM has evolved since the approval of the Stage 1 Project Application. Table 2 has been sourced from information in the Department's AR.

Table 2 - Summary of changes to the KPOM

Aspect	Project as Currently Approved	Proposal (as exhibited)	Proposal (as amended by the RtS Addendum)
Retained Koala Habitat	No figure specified	183.05 ha	206.05 ha
Total Koala habitat clearing	7.49 ha	14.92 ha	8.00 ha
Total off-site (or additional) offset	27 ha of within Cudgen Nature Reserve	Nil	27 ha within Cudgen Nature Reserve, or an alternate location, as approved by the Planning Secretary
Proposed offset planting within the east-west corridor	Planting on approximately 6 ha within a 100 m wide east-west corridor	Planting on 2 ha within a 50 m wide east-west corridor	Planting on 6.26 ha, within a 100 m (approx.) wide east-west corridor
Total on-site offset	54.9 ha	54.71 ha	62.51 ha
Combined offset area (on- and off-site)	87.9 ha	56.71 ha	95.77 ha
Total primary Koala offset habitat	No figure specified	42.4 ha	65.44 ha
Total proposed primary Koala food trees	No figure specified	16,460	43,554
Total proposed secondary Koala food trees	No figure specified	5,724	32,857
Total proposed Koala food trees	10,284 koala food trees, and 10,294 endemic sclerophyll forest species	22,184	76,411
Number of fauna underpasses	2 fauna underpasses identified	A maximum of 2 underpasses identified	Minimum of 7 fauna underpasses

Source: Department of Planning & Environment's Assessment Report

1.4 Stated need for the Application

18. The Department's AR stated that in order "to offset the loss of koala habitat and manage the residual impacts of the development on koalas, the Project Approval includes conditions requiring the Proponent to provide a comprehensive offset package and implement a Koala Plan of Management (KPOM) for the life of the development".
19. In relation to the EPBC Referral, the Department's AR stated that "the Commonwealth approved the proposal, permitting more clearing and fewer offsets, compared to the Project Approval".
20. The Department's AR stated that after receiving approval from the Commonwealth, the Proponent submitted the Application to the Department "seeking to align both approvals, by increasing the amount of koala habitat to be removed from 7.49 ha to 14.92 ha (due to previous mapping errors) and reducing the required koala offsets by:
 - deleting the requirement to provide 27 ha of off-site offsets
 - partially providing the east-west wildlife corridor, with 2 ha of koala offsets
 - reducing the on-site offsets from 54.9 ha to 54.71 ha."

2. THE DEPARTMENT'S CONSIDERATION OF THE MODIFICATION

2.1 Key steps in Department's consideration of the Modification

21. According to the Department's AR, the Department received the Application on 21 June 2017 and it was placed on public exhibition from 29 June 2017 to 18 August 2017. The Department received 2 submissions from government agencies and 1,664 public submissions (see **Table 3**). The Commission notes that these submissions relate to the Application that was originally submitted to the Department (**Original Application**) and not the Application as subsequently amended.

Table 3 – Overview of Submissions

Submitters	Number	Position
OEH	1	Comment
Council	1	Object
Community	1637	Object
	16	Comment
	1	Support
Special Interest Groups	10	Object

Source: Department of Planning & Environment's Assessment Report

22. The Department's AR stated that the Department engaged Eco Logical Australia Pty Ltd (Eco Logical) as an independent ecologist to review the merits of the Proponent's KPOM. Eco Logical provided a report to the Department in September 2017.
23. In June 2018, the Proponent provided an RtS with an amended scope of works. The RtS was made publicly available on the Department's website and further comments were received from Council, the OEH and Team Koala. The Department's AR stated that *"while some of the proposed amendments were supported, several concerns remained about the proposed offsets, the design of koala fencing and crossings as well as a number of technical and administrative issues"*.
24. In response to the issues raised in relation to the RtS, the Proponent lodged an RtS Addendum in October 2018. The RtS Addendum included a final KPOM proposing changes to the planting densities, increased the quantum of compensatory koala habitat and revised the location and design of the koala fencing, underpasses and "cattle grids".
25. According to the Department's AR, the RtS Addendum was made publicly available on its website and *"the Department received submissions from Council, the OEH and Team Koala, all of which continued to raise concerns about several technical and administrative issues which could potentially impact on the implementation of the KPOM"*.
26. The Department engaged EMM Consulting Pty Ltd (**EMM Consulting**) as an independent ecologist to review (Independent Ecological Review) and provide advice on the adequacy of the KPOM for the Project Site. EMM Consulting provided a report to the Department on 10 November 2018.

2.2 The Department's Assessment Report (AR)

27. The Department's AR stated that the key issues associated with the Application include: *"the suitability of the proposed koala offset strategy; the design of the koala fencing and crossings; and the adequacy of the contingency measures"*.

28. The Department's AR concluded that:

"the Department is satisfied the revised KPOM would now provide appropriate offsets in accordance with the framework established under the Project Approval.";

"the Department supports the proposed koala infrastructure, subject to the Proponent revising the fencing plans to ensure it does not result in additional vegetation clearing, or fragment retained or offset habitat and amending the design of culvert five to facilitate its use as an underpass";

"subject to the recommended conditions of approval, the Department is satisfied suitable contingency measures would be provided if there is a significant reduction in koala numbers on the site, or koala habitat does not successfully establish"; and

"the Department has reviewed the balance of primary and secondary koala habitat proposed on-site and the revised tree planting schedule and agrees the revised KPOM will ensure 95% of the proposed offset areas comprise primary habitat capable of increasing the koala carrying capacity of the site".

3. THE COMMISSION'S MEETINGS AND SITE VISIT

29. As part of its determination, the Commission met with the Department, Proponent and OEH, and conducted an inspection of the site and surrounding locality.

3.1 Meeting with the Department

30. On 18 February 2019, the Department met with the Commission to discuss the Department's AR. A copy of the meeting agenda and transcript has been available on the Commission's website since 8 March 2019.

3.2 Meeting with the Proponent

31. On 18 February 2019, the Proponent met with the Commission. The key discussion points were in relation to the koala offset strategy, koala fencing, tree selection, regional koala populations and the conditions of consent. A copy of the meeting agenda and transcript were made available on the Commission's website on 8 March 2019.

3.3 Meeting with Tweed Shire Council

32. On 12 March 2019, the Commission met with Council to discuss their views on the Application. A copy of the transcript of the meeting was made available on the Commission's website on 18 March 2019.

3.4 Public Meeting

33. To hear the community's views on the proposal, the Commission held a public meeting at the Mantra on Salt, Gunnamatta Avenue, Kingscliff NSW 2487 on 12 March 2019. A list of the 23 speakers who presented to the Commission and a copy of the transcript of the public meeting was made available on the Commission's website on 15 March 2019. All members of the public who registered were provided with the opportunity to speak.

A copy of the information tendered at the public meeting was also made available on the Commission's website since 22 March 2019.

34. An opportunity to lodge written comments was afforded until seven days following the public meeting. The Commission received 113 written comments, which were made available on the Commission's website.
35. In summary, the main issues of concern raised by the community included:
- diminishing koala populations and degradation of habitat in the region;
 - koala offset plantings;
 - koala connectivity between precincts;
 - underpasses for entrance roads through Environmental Protection Zones;
 - fencing of environmental zones and buffers adjoining the golf course;
 - timing of the development and requirements of the KPOM;
 - threats koala including fire, road deaths, chlamydia and dog attacks;
 - the impact of construction activities on the local koala population; and
 - tourism benefits from a local koala population.

3.5 Site Inspection

36. On 12 March 2019, the Commission conducted an inspection of the Project Site. The Proponent attended the site inspection and directed the Panel to specific features and locations within the Project Site. The Commission also invited representatives from local community groups to attend and observe at the site inspection. The following local community groups were represented at the site inspection:
- Earth Learning Inc
 - Cabarita Beach Bogangar Residents Association
 - Friends of Cudgen Nature Reserve
 - Team Koala.
37. The Proponent provided maps to assist with the inspection of the Project Site. The maps were made available on the Commission's website on 1 April 2019. A summary of questions asked by the Commission at the site inspection, and answers given by those present, were also made available on the Commission's website on 1 April 2019.

3.6 Meeting with the Office of Environment and Heritage (OEH)

38. On 29 March 2019, the Commission met with a representative from the OEH. The key discussion points were in relation to koala offsets, koala movement and fencing, koala food tree species and performance criteria. A copy of the meeting transcript was made available on the Commission's website on 1 April 2019.

4. THE COMMISSION'S CONSIDERATION

4.1. Material considered by the Commission

39. In this determination, the Commission has carefully considered the following material (**Material**):

- original Project Approval and approved modifications, and associated Planning Assessment Commission reports;
- S75W Modification Application dated 21 June 2017, prepared by DAC Planning Pty Ltd (**DAC Planning**) and attachments;
- Tweed Shire Council submission during exhibition dated 25 July 2017;
- OEH submission during exhibition dated 28 July 2017;
- Tweed Shire Council addendum final comments dated 28 September 2017;
- Independent Ecological Review of Proponent's KPOM dated 28 September 2017, prepared by Eco Logical for the Department;
- Proponent's RtS dated June 2018, prepared by DAC Planning;
- Tweed Shire Council submission on the RtS dated 13 July 2018;
- OEH submission on the RtS dated 25 July 2018;
- Proponent's RtS Addendum dated 4 October 2018, prepared by DAC Planning
- OEH submission on the RtS addendum dated 8 November 2018;
- Tweed Shire Council submission on the RtS addendum dated 15 November 2018;
- Independent Ecological Review of Proponent's KPOM dated 10 November 2018, prepared by EMM Consulting for the Department;
- Department's AR dated December 2018 and all associated documents;
- Proponent's response to the Department's AR, prepared by James Warren & Associates (**JWA**) dated February 2019, including:
 - Determination of Forest Red Gum establishment on Kings Forest Site prepared by Terrestria Ecological Management (Terrestria) dated February 2019;
- material provided by the Proponent at the meeting with Commission on 18 February 2019;
- all oral comments made to the Commission at the public meeting held on 12 March 2019;
- Tweed Shire Council comments on Applicant's revised KPOM dated 6 March 2019;
- information provided by the Proponent at the site inspection on 12 March 2019;
- Tweed Shire Council response to queries raised at the meeting with the Commission dated 19 March 2019;
- Proponent's Bulk Earthworks Compliance Assessment dated 19 March 2019;
- all written comments received by the Commission up until 19 March 2019;
- Cudgen Nature Reserve planting records provided by Friends of Cudgen Nature Reserve dated 20 March 2019; and
- Proponent's supplementary response dated 21 March 2019.

4.2. Quantum and Delivery of Koala Offsets

Public comments

40. The Department's AR stated that public submissions during exhibition "*raised concern that the proposed offsets were inconsistent with the requirements of the Project Approval and reducing the required offsets would result in a poor outcome for koalas*".

41. The Commission heard concerns from speakers at the public meeting and received written comments regarding the reduction and staging of koala habitat offset requirements.

Council comments

42. In reference to the Original Application, Council stated that *“the proposed modification is fundamentally inconsistent with the State conditions of approval, and if approved, it is considered that this would see a worse outcome for koalas”*.
43. Council made a submission to the Department in response to the revised scope and reinstatement of offsets in the RtS. Council stated that *“the draft revised KPOM is now largely consistent with Project Condition 45”*.

Proponent’s consideration

44. The Original Application sought to remove the requirement to plant koala food trees on a 27ha parcel of land within Cudgen Nature Reserve (**27ha Offsets**). The Proponent stated that the requirement for *“an additional 27 hectares of land be restored, as nominated by OEH, in the Cudgen Nature Reserve is unreasonable and onerous, particularly in the context of the fact that the Federal Approval only requires 43.45 hectares and the amended Koala Management Plan will incorporate a total of 56.71 hectares of Koala habitat planting”*.
45. The Proponent stated in its RtS that *“following consideration of the submissions, the requirement to plant 27 hectares offsite will be retained”* and *“following consideration of the submissions in relation to this issue an east-west wildlife corridor will be provided in accordance with Condition 45(1)(b) of MP08_0194 and CP06_0314 Condition B4”*.

Department’s consideration

46. The Department’s AR stated that the independent ecologist shared same the concerns raised by the community and recommended that *“the KPOM be revised to comply with the offsets required by the Project Approval”*. The independent ecologist also noted that *“the quantum of offsets between the State and Commonwealth approvals do not need to align and the Commonwealth approval should not be used to justify the proposed reduction in offsets”*.
47. The Department’s AR stated that the revised KPOM was reviewed by the independent ecologist who confirmed that *“the quantum of compensatory koala habitat is suitable and consistent with the offset framework established under the Project Approval”*. According to the Department, Council and OEH support the proposed revised quantum of offsets.
48. The Department’s AR stated that the Department assessed the revised KPOM and is *“satisfied it now provides an appropriate quantum of offsets, to compensate for the loss of koala habitat from the site”* and *“the proposal now fully complies with the quantum of offsets required under Condition 45 of the Project Approval”*. Table 4 below demonstrates the revised proposals compliance with Condition 45 of the Project Approval.

Table 4 – Compliance with Condition 45 (revised proposal)

Offset Location	Required Offset	Revised Offset	Complies
Off-site	27 ha	27 ha	Yes
East-west corridor	6 (approx.)	6.26 ha	Yes
On-site	54.9 ha	62.51 ha	Yes

Source: Department of Planning & Environment's Assessment Report

49. The Department's AR concluded that *"the proposed quantum of offsets are (sic) consistent with the framework established under the Project Approval and are sufficient to compensate for the loss of koala habitat from the site"*.
50. In relation to the timing of on-site compensatory offsets, the Department's AR stated that:
- "the koala offsets should be delivered ahead of clearing to manage the impacts of the project on koalas and their habitat. Accordingly, the Department supports the use of the offset ratio recommended by the independent ecologist and has recommended conditions of approval requiring the koala offsets, for each stage of the development, to be provided at a ratio of 1:8.6. This will ensure suitable offsets and habitat linkages are created and maintained during the construction phase of the project"*
51. The Department's AR concluded that subject to the recommended conditions of approval *"the Department is satisfied the proposed offsets would be provided within an appropriate timeframe, to compensate for the loss of koala habitat from the site."*

Commission's consideration

52. The Commission accepts the analysis and conclusions referenced in paragraphs 48 and 49 in that the proposed quantum of offsets in the revised KPOM is required because it will compensate for the loss of koala habitat and is consistent with the Project Approval.
53. Based on the material, the Commission accepts the Department's analysis and conclusion, referenced in paragraphs 50 and 51, and finds that the delivery of koala offsets should be delivered ahead of clearing because this will ensure suitable offsets and habitat linkages are created and maintained during the construction phase of the Project.

4.3. 27ha Offsets

Public Comments

54. The Department's AR stated that the location of koala offset habitat was one of the key issues raised in public submissions during exhibition. According to the Department's AR, Team Koala raised concern that the KPOM should identify the location of the additional off-site offsets and the timing for their delivery.
55. The Commission heard concerns from speakers at the public meeting and received written comments regarding the location of the additional offset plantings and that they needed to be secured prior to construction certification (CC) and commencement of

construction. Several members of the public placed emphasis of having the location of the offsets secured through a legally binding agreement.

Council Comments

56. During exhibition, Council made a submission to the Department raising concern regarding the “*substantially reduced area for koala habitat offsets*”. In reference to the Original Application, Council stated that “*the proposed modification is fundamentally inconsistent with the State conditions of approval, and if approved, it is considered that this would see a worse outcome for koalas*”.
57. Council provided comments to the Department in response to the RtS and stated that the draft revised KPOM proposes the restoration of 27ha off-site at Cudgen Nature Reserve and is now largely consistent with Condition 45 of the consent, however, Council remained concerned that the location of the off-site offsets were yet to be determined.
58. In Council’s comments provided to the Commission, Council raised concerns regarding the timing of the 27ha Offset and stated that:

“The proposed modification (Condition 45A(2)) maintains the 27ha offset requirement but allows approval of details of an alternative offset site to be provided 6 months after the approval of a Construction Certificate (CC) for clearing or bulk earthworks. This potentially allows the proponent to carry out clearing without certainty about the delivery of the required offset. Council recommends that any alternative site be secured before CC.”

“...Additionally the proposed Condition 45A(2) (c) and (d) require offset planting to commence within 2 years of suitable offset sites being identified, and completed within 3 years. Council do not see the need for this delay and recommend that such planting should commence within 1 year and be completed within 2 years”.

59. Council also noted that in the Proponent’s response to the proposed conditions the Proponent sought an amendment to allow the off site obligation to be discharged via a payment to the Biodiversity Conservation Trust (**BCT**). Council raised concern as to whether an approach involving a discharge to the BCT could be legally achieved and stated that it is unlikely that the BCT could be bound to deliver offsets locally. Council supported providing the off-site (additional) offsets within the Kings Forest site:

“Council doubts if this approach could be legally achieved by the BCT as neither the offset nor the proposed financial compensation were determined under the Biodiversity Conservation Act 2016. Further it is unlikely the BCT could be bound to deliver an offset locally in accordance with the intent of the proposed Condition 45A (2)(a). Notwithstanding, Council supports the proponent’s suggestion proposed to include possible offsetting on the Kings Forest site as a further option if that is considered necessary.”

Proponent’s Consideration

60. In the Application, the Proponent stated that:

“...it is considered that the requirements of Condition 45(1)(a) that an additional 27 hectares of land be restored, as nominated by OEH, in the Cudgen Nature Reserve is unreasonable and onerous, particularly in the context of the fact that the Federal Approval only requires 43.45 hectares and the amended Koala Management Plan will incorporate a total of 56.71 hectares of Koala habitat planting.”

61. In response to submissions received during exhibition the Proponent stated in its RtS that *“Condition 45(1)(a) will be retained and accordingly the 27 hectares of Koala food trees will be provided offsite, or as otherwise approved by the Secretary”*.
62. In response to the Department's conditions the Proponent stated in their comments to the Commission that *“the amended condition does not allow for the entire 27 hectares to be planted outside of the Cudgen Nature Reserve, does not allow for the planting to occur on the Kings forest site itself, nor does it allow for financial offsetting as prescribed in the Biodiversity Offsets Scheme of 2016”*.
63. The Proponent also stated in their comments to the Commission that they have *“been informed by OEH that only a small area of land is now available for Koala food tree planting in the Cudgen Nature Reserve”*. The Proponent states that as a result they *“may have no option but to plant the 27 hectares on the Kings Forest site”* and that *“an allowance for this option must be contained in this part of the condition”*.

Department's Consideration

64. The Department's AR stated that *“while all stakeholders support reinstating the requirement to provide 27ha of off-site offsets, concerns were raised regarding the lack of details about when and where the offsets were going to be provided”*.
65. According to the Department's AR *“the Proponent advised the land previously identified within Cudgen Nature Reserve has been planted out by others and it is unclear whether 27ha of additional land is available within Cudgen Nature Reserve. As such, an alternative site may need to be found.”*
66. The Department's AR stated that *“all stakeholders recognise there may be a need to provide the koala offsets in an alternative location”*. The Department agreed that *“the delivery of the off-site offset is a critical component of the koala offset package and should be delivered within an appropriate timeframe and location”*.
67. According Department's AR, the Independent Ecological Review suggested that *“should the 27 ha not be secured prior to the release of the first Construction Certificate, a monetary contribution should be provided to OEH to the equivalent value”*. However, the Department stated that *“the Proponent should maintain the current obligation to physically plant out 27ha of koala food trees off-site”*.
68. As such the Department recommended a new condition requiring the Proponent to update the KPOM to specify:
 - *“the timing for securing the off-site offset*
 - *the timing for the commencement of planting within the off-site offset*
 - *an appropriate location for the 27ha off-site offset, should land not be available*

within the Cudgen Nature Reserve

- *the standards for achievement and any on-going monitoring measures required within the off-site offset area.”*

69. Subject to the recommended conditions of approval, the Department's AR concluded that:

“The Department is satisfied the revised KPOM would now provide appropriate offsets in accordance with the framework established under the Project Approval”; and

“...the Department's assessment concludes off-site offset would be appropriately secured within an appropriate timeframe and location”.

Commission's Consideration

70. The Commission accepts the Department's finding in paragraph 66 that the delivery of 27ha of additional offsets are a critical component of the koala offset package because the KPOM will provide appropriate offsets in accordance with the Project Approval.
71. The Commission acknowledges Council's concerns raised in paragraph 59 and accepts the Department's finding in paragraph 67 because the delivery of actual offsets will result in an improved habitat for Koalas. The Commission finds that the Proponent should maintain the current obligation to deliver physical planting out of 27ha of additional koala food trees and that conditioning of a bond or bank guarantee relating to the reduction of koalas on site would be unreasonable as it may not be possible to attribute a wider decline in koala numbers to the Project.
72. Based on the Material, and acknowledging the concerns raised by the public and Council as referenced in paragraphs 55 and 58, the Commission finds that 27ha of additional offset should be secured and planting should occur prior to issue of a CC in order to ensure certainty for the required offsets and to facilitate improvements to the available quantum of koala habitat in the vicinity prior to any impacts arising from the Project.
73. The Commission acknowledges the concerns raised by the Proponent in paragraph 63 and finds that allowance must be made for the Proponent to undertake the 27ha Offset planting at one or a number of locations off-site and proximate to Kings Forest, but not necessarily confined to Cudgen Nature Reserve because suitable areas within the nature reserve may no longer be available. The Commission also finds that some or all of the 27ha Offset planting could be undertaken by the proponent on-site, within the Kings Forest Project Site.
74. The Commission accepts the recommendations of the Department outlined in paragraph 68, requiring the Proponent to update the KPOM because this will ensure that koala habitat is secured and provided in an appropriate timeframe.

4.4. East-West Wildlife Corridor

Public Comments

75. The Department's AR stated that public and agency concerns were raised regarding *"the east-west wildlife corridor only being partially provided and not complying with the requirements of the Concept and Project Approvals"*.
76. The Commission heard concerns from speakers at the public meeting and received written comments regarding the importance of koala connectivity by maintaining the east-west wildlife corridor. Emphasis was also placed on the timing of the east-west corridor to ensure that connectivity was provided during the development of the Project Site.

Council Comments

77. During exhibition of the Application, Council made a submission to the Department raising concerns that the *"proposal only partially implements the required E-W wildlife corridor"*.
78. As referenced in paragraph 43, Council made a submission to the Department in response to the RtS stating that the draft revised KPOM is now largely consistent with Condition 45 of the Project Approval.

Proponent's Consideration

79. The Original Application sought approval to reduce the requirements of the east-west wildlife corridor. According to the Proponent this involved the *"planting of Koala food trees within a 50 metre wide portion of the east-west wildlife corridor required under Term B4 of the Kings Forest Concept Plan Approval"*.
80. The Proponent stated that *"following consideration of the submissions in relation to this issue an east-west wildlife corridor will be provided in accordance with Condition 45(1)(b) of MP08_0194 and CP06_0314 Condition B4"*.

Department's Consideration

81. The Department's AR stated that the independent ecologist considered *"the planting of koala food trees within the full extent of the east-west wildlife corridor satisfied the requirements of Condition B4 of the Concept Approval."*

82. The Department also notes that:

"Condition C28 of the Concept Approval requires the Proponent to provide the east-west wildlife corridor as a part of Stage 2. The intent of the Condition C28 was to ensure the east-west corridor is established prior to development occurring in the western portion of the site, to provide connectivity for koalas and other wildlife across the site. The Department, therefore, considers the east-west wildlife corridor should be delivered as a part of Stage 2, consistent with the requirements of the Concept Approval."

83. In relation to the revised KPOM, the Department's AR stated that Council and OEH also support the provision of the east-west wildlife corridor to its full extent and its delivery

earlier as part of Development Stage 2 (**Stage 2**).

Commission's Consideration

84. Based on the Material, and acknowledging the concerns raised by the public and Council referenced in paragraphs 76 and 77, the Commission finds that the planting of koala food trees within the full extent of the east-west wildlife corridor is required because it provides for koala connectivity and satisfies the requirements of the Concept Approval.
85. The Commission acknowledges the concerns raised by the Department in paragraph 82 and finds that the east-west wildlife corridor should be delivered as a part of Stage 2 to ensure that connectivity is provided for koala and other wildlife prior to development occurring in the western portion of the site.

4.5. Koala Fencing & Road Crossings

Public Comments

86. The Commission heard concerns from speakers at the public meeting and received written comments regarding the location of koala fencing within the golf course and the importance of underpasses being in place prior to the commencement of construction activities.

Council Comments

87. Council made a submission to the Department during the Department's exhibition raising concern that *"the proposal removes fencing and underpasses where roads traverse environmental areas. These measures will make koalas and other fauna vulnerable to road strike"*. In reference to the Original Application, Council stated that it *"did not demonstrate fencing and underpasses plans that would effectively keep koalas from entering the development zone and dogs from accessing environmental areas as required by the conditions of consent"*.
88. Council provided comments to the Department in response to the RtS and stated that the revised KPOM now adequately addresses these issues both during construction and in the longer-term subject to clarification of the following issues:
 - indicative location of fauna underpasses and their suitability;
 - underpass number 5 over Blacks Creek and its effectiveness to allow underpass opportunities for koalas; and
 - clarification on how the permanent fencing proposed for the "Cudgen paddock" will adequately address the requirement for a 50m ecological buffer in this location.
89. In Council's comments to the Commission, Council acknowledged the practical difficulties in ensuring underpasses are in place at the time of fencing. To address this issue, Council recommended an amendment to the Conditions *"to avoid the need for temporary fencing on either side of the roads during construction in favour of gates at either end of the environmental areas which would be closed at night thus allowing*

free movement between habitat areas at night”.

90. Council maintains that the installation of permanent fauna exclusion fencing on the inside of the ecological buffer in the area of the proposed golf course is *“inconsistent with the ecological buffer requirements of the Kings Forest Major Projects SEPP and the Concept Plan which contemplated koalas using the proposed golf course which would act as a buffer. It is recommended that the fauna exclusion fencing should encompass the golf course itself.”*
91. Council maintains that the golf course is to function as an ecological buffer and the fencing should separate the golf course (Precinct 14) from the adjacent urban areas (Precincts 12 and 13). Council recommended that Condition 46A(6) of the Project Approval be amended to ensure *“that koalas and other terrestrial wildlife can use the golf course as contemplated in the Concept Plan”*.
92. Council further stated that:

“contrary to DP&E statement that Mod 2 approved the “expansion” of the golf course (see p 28 of DP&E report of Dec 2018), it is noted the golf course was always located partly within the ecological buffers and anticipated koalas using the entire golf course. This includes the KPoM for Mod2 – see figures 14 and 20 which show koala tree planning within the golf course and mention the need for fencing to prevent koalas from accessing the adjacent urban areas. Further, Mod 2 contains no consideration of how excluding faunal use of the ecological buffers in the golf course could meet the ecological buffer requirements of the Kings Forest Major Project SEPP. Commented [A23]:”
93. Council also noted that their concerns in relation to the Blacks Creek underpass have been addressed by the Department’s proposed amendment to Condition 45A(7b) of the Project Approval.

Proponent’s Consideration

94. In relation to the timing of underpasses, the Proponent stated in their Application that *“fauna underpasses cannot be constructed prior to commencement of bulk earthworks as they are an integral part of the road formation and must be constructed as part of the road construction”*. This was further reiterated by the Proponent in their comments provided to the Commission where they stated that *“no additional underpasses are contemplated for construction. All underpasses will be constructed at the same time as the associated roads are constructed”*.
95. The Proponent confirmed in their comments to the Commission that Council’s recommendation in relation to temporary fencing referenced in paragraph 89 could be achieved by stating:

“The protection of koalas (and other fauna) during haul road movements to and from the Cudgen Paddock (Precincts 12-14) can be achieved by implementing the TSC proposal to not use temporary fencing on either side of the roads during construction but, rather, include gates at either end of the environmental areas which would be closed at night thus allowing free movement between habitat areas at night. This proposal would need to be accompanied by construction management measures to

minimise road strike during the day.”

96. In relation to koala fencing of the golf course, the Proponent stated that they *“will not be allowing koalas access to the Golf Course”* and that the amended conditions proposed by Council are not acceptable.
97. The Proponent stated that the KPOM prepared for the Concept Plan *“envisaged koalas roaming through the Golf Course and also allowed for areas of plantings within the Golf Course”*. The Proponent stated that *“there were numerous reasons for the philosophy shift to excluding koalas from the Golf Course precinct including the practicalities of human access to the Golf Course and likely impacts to koalas inhabiting the Golf Course”* and that this was *“accepted by DoPE via the Project Approval in 2013”*.

Department's Consideration

98. In relation to the provision of underpasses and temporary fencing, the Department's AR stated that *“the proposal seeks to change the timing of the koala infrastructure by bringing forward the requirement to provide fencing and delaying the requirement to provide underpasses”*. The Department considered these changes and is satisfied the proposed timing is acceptable because:
 - *“the proposed changes to the timing for the installation of fencing would provide a positive outcome as it would ensure temporary and/or permanent fencing is in place to protect koalas and other wildlife prior to the commencement of works;*
 - *the proposed changes to the timing for the construction of the underpasses is necessary given the underpasses form part of the road construction works and cannot be undertaken prior to bulk earthworks commencing...”*
99. In relation to koala fencing, the Department's AR stated that *“minor modifications are recommended to ensure the fencing avoids additional vegetation clearing and habitat fragmentation. The Department noted that this would also partly address Council's concerns as it would help prevent the fragmentation of habitat around the golf course.”*
100. In relation to the concerns raised regarding underpass number 5 over Blacks Creek, the Department's AR stated that it has *“included a condition requiring the design of culvert five to be amended to facilitate its use as an underpass. Subject to these changes, the Department is satisfied the proposed koala crossings and fencing are acceptable”*.
101. The Department's AR concluded that *“overall, the Department supports the proposed koala infrastructure, subject to the Proponent revising the fencing plans to ensure it does not result in additional vegetation clearing, or fragment retained or offset habitat and amending the design of culvert five to facilitate its use as an underpass.”*

Commission's Consideration

102. The Commission acknowledges the concerns raised by the public in relation to the timing of construction of the underpasses. However, the Commission accepts that there are difficulties in ensuring that underpasses are in place prior to bulk earthworks, for the reasons noted by Council and the Proponent in paragraphs 89 and 95. The

Commission accepts the Department's finding in paragraph 98 that the timing of koala fencing and the provision of underpasses can be delayed as it will result in a positive outcome by ensuring temporary and/or permanent fencing to protect koalas and other wildlife is in place prior to the commencement of works. To address the concerns raised in relation to koala movement throughout the construction period, (until permanent road works and associated underpasses are in place), the Commission finds that alternative arrangements for construction fencing and gateways that ensure that koala connectivity is always maintained outside of daytime construction activity are feasible and can be adaptively managed under appropriate conditions of consent.

103. The Commission accepts the Department's recommendation in paragraph 100 requiring underpass number five over Blacks Creek to be amended to facilitate its use as an underpass because this will assist in improving koala connectivity throughout the site. The Commission acknowledges that Council's concerns have been addressed by the Department's amendment to the current conditions of consent as per paragraph 93.
104. The Commission acknowledges the Proponent's concerns in relation to the fencing of the golf course referenced in paragraph 97. However, the Commission finds that the golf course should function as an ecological buffer and the fencing should separate the golf course (Precinct 14) from the adjacent urban areas (Precincts 12 and 13) for the reasons given by the public in paragraph 86 and Council in paragraph 90, 91 and 92. Therefore, the Commission finds that Condition 46A(6) of the Project Approval should be amended to ensure that koalas and other terrestrial wildlife can utilise the golf course.

4.6. Koala Habitat Planting

Public Comments

105. The Commission heard concerns from speakers at the public meeting and received written comments regarding koala habitat primary and secondary planting and the timing of plantings.

Council Comments

106. In relation to vegetation management, Council stated in their comments to the Commission that the Department's proposed amendment to Condition 45A(4) of the Project Approval is not considered practical or workable because:
 - 1) *“the plantings are primarily for koalas and are not designed to replicate a particular Plant Community Type (PCT);*
 - 2) *under the approval all performance criteria need to be framed in terms of the “establishment period” and “maintenance period”;*
 - 3) *the proposed performance criteria do not address the critical early phases (establishment period) of the plantings; and*
 - 4) *PCTs for the far north coast are not finalized or useable for the site”.*
107. According to Council, measurable indicators are needed that define progress on establishing the plantings. Council recommends *“using a number of simple and easily defined indicators, framed in terms of establishment and maintenance periods, to*

address this issue” rather than a numeric vegetation integrity score. Council stated that ‘establishment period’ can be measured as 95% of seedling survival and ‘maintenance period’ can be used to measure native canopy cover which ranges from 50% to 80% in order to create an open forest structure.

108. Council in their comments to the Commission stated that 3 years, rather than the currently proposed 7 years, is sufficient time to decide if enhancement planting is required. Council suggested a revision to the conditions of consent to reflect the above.
109. In relation to corrective action, Council noted that the *“proponent objects to the proposed condition 45A(9)(f) (Feb 2019, p22) relating to the proposed forest red gum plantings and appears to hold that this species should be dropped if initial losses are greater than 15%”*. Council maintains that this approach does not appear to be justified and that *“corrective actions need to be specified for all offset plantings not just for forest red gum”*.
110. In relation to planting density, Council stated in their comments to the Department on the RtS Addendum that *“the draft revised KPOM proposes planting of canopy trees at 5m spacings (1 per 25m²). In the natural situation the canopy trees of these coastal forests will occur at densities of around 3m spacings”*. Council recommended that *“canopy species are planted at 3m spacings and the number of small trees and shrubs is halved from 8 to 4 per 25m². This should ensure more rapid canopy development, including more koala food trees and less ongoing maintenance without increasing the overall number plants.”*

Proponent’s Consideration

111. In relation to rehabilitation performance criteria, the Proponent stated in their comments to the Commission that they have elected to plant large numbers of koala primary food trees instead of re-establishing the pre-clearing PCT. The Proponent agrees with Council in that the performance criteria need not be assessed against the relevant PCT. The Proponent also stated that the KPOM will be amended to *“include measurable indicators that define progress on establishing the plantings”* and to *“utilise a number of simple and easily defined indicators, framed in terms of establishment and maintenance periods”*.
112. In their comments provided to the Commission, the Proponent’s Forest Red Gum Establishment Report stated that *“the agencies have agreed that, based on the new dense planting schedule, there would be no requirement for shrub or groundcover plantings as they would likely establish, naturally, over time. NSW Office of Environment and Heritage (OEH) and NSW Department of Planning and Environment (DoPE) agreed with this amendment to the planting program”*. The Proponent also stated in their comments to the Commission, that *“the high density of primary food tree plantings would make the planting of shrubs and groundcovers impractical”*.
113. The Proponent stated that performance criteria should relate only to the primary koala food trees planted as compensatory habitat.
114. The Proponent noted in their comments to the Commission that *“koala compensatory habitat tree offsets will be provided on an area for area basis, for any area of compensatory koala tree habitat that does not meet the required performance targets”*

within 7 years”.

Department’s Consideration

115. According to Department’s AR, the independent ecologist reviewed the Application and advised that the KPOM should be revised to provide for the planting of a 10,294 Eucalyptus robusta (swamp mahogany) or Eucalyptus tereticornis (red gum) koala food trees and specify the area and number of food trees proposed in each habitat ‘type’.
116. The Department’s AR stated that the Proponent submitted a revised KPOM in response to the recommendations of the ecological review, and the issues raised in the agency and public submissions. According to the Department’s AR *“the independent ecologist, Council and the OEH support the revised balance of primary and secondary habitat proposed on-site, and the type and density of koala food tree plantings”.*
117. The Department’s AR stated that *“the Department has reviewed the balance of primary and secondary koala habitat proposed on-site and the revised tree planting schedule and agrees the revised KPOM will ensure 95% of the proposed offset areas comprise primary habitat capable of increasing the koala carrying capacity of the site”* and *“the Department supports the proposed mix of koala food trees and the revised tree planting schedule”.*
118. The Department’s AR stated that *“the Department has recommended modifications to the conditions of approval to ensure koala food tree planting is delivered in accordance with the requirements of the final KPOM”.*

Commission’s Consideration

119. The Commission accepts Council’s and the Proponent’s comments referenced in paragraphs 106, 107 and 111 in that measurable indicators are required to define progress on establishing the plantings because this will effectively resolve the vegetation management issues in the Project Approval. The Commission accepts that these performance indicators can be framed in terms of ‘establishment’ and ‘maintenance’ periods and have amended the conditions of the Project Approval. Based on the Material, the Commission finds that 90% seedling survival for the ‘establishment’ period and 80% canopy cover for the ‘management’ period are suitable performance criteria because they are measurable indicators that easily define the progress of the koala offset plantings for an open forest structure.
120. The Commission accepts the Proponent’s statements in paragraph 112 and 113 that there will be no shrub or groundcover plantings and that the performance criteria should relate only to the primary koala food trees planted as compensatory habitat because this will give primacy to establishing new koala food trees and will ensure that koala food tree planting is delivered in accordance with the requirements of the final KPOM. The Commission notes that weed management and control will occur during the ‘establishment’ and ‘maintenance’ phases and that if, during the ‘maintenance’ phase, weeds or exotic species rather than native ground covers establish ground cover plantings may need to occur, as an adaptive response.
121. The Commission accepts Council’s recommendation in that canopy species should be planted at 3m spacings in order to reflect the natural situation in which the canopy trees

occur in the coastal forests for the reasons given in paragraph 110.

122. The Commission accepts the Proponent's finding that koala compensatory habitat offsets will be provided on an 'area for area' basis for any area of compensatory koala tree habitat that does not meet the required performance targets within 7 years as referenced in paragraph 114. Based on the Material, the Commission finds that 7 years is sufficient time because this will allow a suitable timeframe to decide whether enhancement planting is required.

4.7. Contingency Measures

Public Comments

123. The Commission heard concerns from speakers at the public meeting and received written comments regarding the importance of a bond for ensuring environmental restoration.

Council Comments

124. Council raised concern in their comments to the Commission regarding *"compliance around created habitat could be interpreted to mean that the proponent may choose to forfeit the environmental bond (Project Condition 50) rather than continuing to meet the establishment or maintenance requirements thus allowing them to proceed to the next stage of the development."*
125. Council noted that offsets should be provided for any compensatory koala habitat that does not meet the required maintenance period performance targets within 7 years, rather than the 10 years provided in the current conditions. Council stated that 10 years is too long and that 7 years provides sufficient time to get the offsets established and take corrective actions before triggering contingency measures at another site. Council also stated that *"it is highly unlikely that the Maintenance Period will be triggered if the offsets are failing. This is because the Maintenance Period commences once the Establishment Period criteria have been achieved."*
126. In relation to the contingency measures to address a decline in koala numbers on-site, Council noted that they are *"not convinced that proposed Conditions 45A(8)(a) iii to v are workable due to the fact that it will not be possible to attribute a decline in koala numbers to the development"*.

Proponent's Consideration

127. In relation to the contingency and offset strategy, the Proponent proposed in their comments to the Commission to amend Condition 45A(7) of the Project Approval as follows:
- i) *"Koala compensatory habitat tree offsets will be provided on an area for area basis, for any area of compensatory koala tree habitat that does not meet the required performance targets within 7 years.*
 - ii) *identify the timing for providing any offsets required to achieve consistency with i) above."*
128. In relation to koala population decline, the Proponent stated:

“It is important to note that the Tweed Coast Endangered koala population is under threat of extinction. This is the case prior to commencement of the Kings Forest development. It will be impossible to determine the role of the Kings Forest development (if any) in an ultimate extinction of the population (should such an event arise). It is, therefore, impractical and unfair to require Project 28 to provide a large sum of bond money to be lost to Project 28 if extinction occurs. Just because koala occupancy rates decline on the Kings Forest site in no way means that the Kings Forest development is specifically the cause of the decline. A wider (Tweed Coast) decline trend would ultimately cause a decline on the Kings Forest site, just as it has on the Koala Beach site near Pottsville to the south.”

Department’s Consideration

129. The Department’s AR stated that:

“the Department has reviewed the final KPOM and agrees that the Contingency Strategy requires additional work to define the triggers for implementation and require suitable measures to be provided if there is a significant reduction in koalas on-site. To address this issue, the Department has recommended a condition of approval requiring the Proponent to provide a bond or bank guarantee, to the satisfaction of the Secretary, which would be used for conservation works to benefit the Tweed Coast Endangered Koala Population, if there is a significant reduction in koalas on-site.

130. In the Department’s AR, the Department noted that Council raised concern about the Contingency Strategy not providing sufficient details of the measures that would be implemented if the koala offsets do not establish in accordance with the KPOM. The Department agrees that the *“Contingency Strategy should be amended to identify the additional offsets that will be provided if the koala offsets do not fully establish in accordance with the targets identified in the KPOM”*. To address this issue, the Department has *“recommended conditions requiring the Proponent to specify the timing and quantum of additional offsets that would be provided if the proposed revegetation works are unsuccessful”*.

131. The Department’s AR concluded that *“subject to the recommended conditions of approval, the Department is satisfied suitable contingency measures would be provided if there is a significant reduction in koala numbers on the site, or koala habitat does not successfully establish.”*

Commission’s Consideration

132. The Commission acknowledges Council’s concerns, referenced in paragraph 124, that the Proponent could potentially choose to forfeit the environmental bond rather than continuing to meet the establishment or maintenance requirements. The Commission considers that the Proponent must meet the conditions requiring establishment and maintenance of koala habitat and that failure to do so would justify compliance action. The environmental bond would be forfeited in the event of a failure to comply with the conditions, or if koala habitat establishment and maintenance failed to succeed and would be available to provide remedial action in such an event, but that would not exclude other additional action, at cost to the Proponent, as may be appropriate to remedy the non-compliance.

133. The Commission acknowledges the concerns raised by Council and the Proponent in paragraphs 126 and 128 that it may not be possible to attribute a decline in koala numbers to the development. The Commission finds that is unreasonable for the Proponent to forfeit a large sum of bond money should there be a significant reduction in koalas onsite when it may not be possible to establish that the Project has either caused or contributed to such a reduction.

4.8. Objects of the EP&A Act and Public Interest

Proponent's Consideration

134. The Proponent's stated in the Application that "*the proposed modification of the Project Approval is considered to be sustainable and in the public interest*".

Department's Consideration

135. In the Department's AR, consideration has been given to the Objects of the EP&A Act.

136. The Department concluded in the Department's AR that:

- the implementation of a revised KPOM would promote the conservation of the State's natural resources, consistent with the objects of the Act;
- the proposal includes mechanisms to implement ecologically sustainable development;
- the proposal will continue to promote the orderly and economic use of development;
- the proposal will incorporate suitable measures to provide for the conservation of koalas on-site and in the broader locality;
- the proposal does not affect the implementation of the Aboriginal Cultural Heritage Program for the site;
- the proposal will not affect future built form outcomes on the site;
- consultation was undertaken with Council and other public authorities and consideration was given to their responses; and
- the proposal was publicly exhibited providing the opportunity for community participation.

137. In relation to Ecologically Sustainable Development (**ESD**), the Department's AR stated that:

"the Department considers that subject to the recommended conditions of approval, the proposal represents a sustainable use of the site, as it would:

- *facilitate the creation of 95.77 ha of compensatory koala habitat to offset the loss of 8 ha of koala habitat within the approved development footprint*
- *implement a range of management measures to ensure the long-term survival of koalas."*

Commission's Consideration

138. In determining the public interest merits of the proposed modification, the Commission has had regard to the objects of the EP&A Act.

139. Under section 1.3 of the EP&A Act, the relevant objects applicable to the project are:
a) *to promote the social and economic welfare of the community and a better*

environment by the proper management, development and conservation of the State's natural and other resources,

- b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- c) to promote the orderly and economic use and development of land,*
- e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- f) to promote the sustainable management of built and cultural heritage,*
- g) promote good design and amenity of the built environment,*
- h) promote the proper construction and maintenance of buildings, including the protection of health and safety of their occupants,*
- i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State, and*
- j) to provide increased opportunity for community participation in environmental planning and assessment.*

140. A key relevant object of the EP&A Act to the Application, as outlined in paragraph 139, is the facilitation of ESD. The Commission notes that section 6(2) of the *Protection of the Environment Administration Act 1991* states that ESD requires the effective integration of social, economic and environmental considerations in its decision-making, and that ESD can be achieved through the implementation of:

- a) the precautionary principle;*
- b) inter-generational equity;*
- c) conservation of biological diversity and ecological integrity; and*
- d) improved valuation, pricing and incentive mechanisms.*

141. The Commission has considered representations, advice and comments provided by government agencies and the community and found that the Application, as modified, is generally consistent with the ESD principles, the Objects of the Act, and is in the public interest because it:

- maintains the quantum of offsets required under the Project Approval;
- will ensure that koala connectivity is maintained and that suitable protection measures are in place during construction activities; and
- will result in a positive ecological outcome for koala and other wildlife.

5. CONCLUSION: THE COMMISSION'S FINDINGS AND DETERMINATION

142. The Commission has carefully considered the Material before it.

143. The Commission finds that the Application is within the broad scope of section 75W, and therefore the request to modify can be considered under section 75W.

144. The Commission finds that:

- the proposed quantum of offsets in the revised KPOM will adequately compensate for the loss of koala habitat, as set out in paragraph 52;
- the delivery of additional 27ha of offsets is a critical component of the koala offset package and the current obligation to physically plant out 27ha of koala food trees should be maintained, as set out in paragraphs 70 and 72;
- offsets need to be secured and planting needs to occur prior to CC, as set out in paragraph 72;
- offsets related to koala habitat or food trees should be delivered ahead of

clearing works to ensure suitable offsets and habitat linkages are created and maintained during the construction phase of the Project, as set out in paragraph 53;

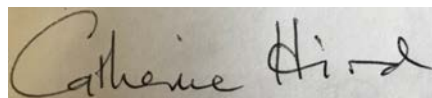
- allowance should be made for the Proponent to undertake additional offset planting within the Kings Forest Project Site, as set out in paragraph 73;
- off-set obligations discharged via a payment to BCT is not permissible, as set out in paragraph 71;
- the east-west wildlife corridor should be provided to its full extent and delivered earlier as part of Stage 2 to ensure connectivity for koalas and other wildlife across the Project Site, as set out in paragraphs 84 and 85;
- it is impractical to require underpasses to be installed prior to bulk earth works and that provision of underpasses can be delayed as it will result in a positive outcome by ensuring temporary and/or permanent fencing is in place to protect koalas and other wildlife prior to the commencement of works, as set out in paragraph 102, provided an adaptive management approach is undertaken to ensure koala connectivity at all times outside of daytime construction activity;
- the golf course should function as an ecological buffer and the fencing should separate the golf course from the adjacent urban areas, as set out in paragraph 104;
- performance indicators should be framed in terms of 90% planting survival rates during 'establishment' period and 80% canopy cover during the 'maintenance' period as set out in paragraph 119, and that canopy species should be planted at 3m spacings as set out in paragraph 121;
- conditioning of a bond or bank guarantee relating to the reduction of koalas on site is unreasonable as it may not be possible to attribute a wider decline in koala numbers to the development, as set out in paragraph 71; and
- the application is in the public interest, as set out in paragraph 141.

145. For the reasons outlined in paragraph 144, the Commission has determined that the application can be approved, subject to conditions.

146. The reasons for the Decision are given in this Statement of Reasons for Decision dated 8 May 2019.



Ross Carter (Chair)
Member of the Commission



Catherine Hird
Member of the Commission



Prof Richard Mackay AM
Member of the Commission