



HASTINGS BIRDWATCHERS Inc.

Submission to the NSW Native Vegetation Clearing Rules review

To whom it may concern

I am writing on behalf of Hastings Birdwatchers (HBW), a community group on the NSW mid north coast, concerned with the conservation of native birds. HBW believes that since their inception in 2017, the native vegetation clearing rules have fallen very short in helping to conserve native vegetation in NSW. Surely at a time when the retention of tree cover in particular is vital to helping reduce carbon emissions as well as critical biodiversity conservation benefits, the NSW Government should be going all out to protect all remaining native vegetation. HBW contends that there is enough land already cleared to maintain NSW's healthy agricultural industry and that protecting remaining vegetation should be of the highest priority for the whole country.

When introduced it was acknowledged that the Land Management and Biodiversity Conservation reform package "may lead to some increased clearing at a property scale, but that checks and balances such as set asides, biodiversity offsets and investment in private land conservation would ensure the impacts of that clearing are managed". This clearly has not been achieved and HBW fully endorses the well-founded criticisms of the existing NSW rules by the Environmental Defenders Office as summarised below.

HBW considers that a new Native Vegetation Act should be adopted unless the shortcomings summarised below can be adequately addressed.

Allowable activities

– Lack of notification requirements and inadequate reporting makes it difficult to determine what percentage of 'unallocated clearing' is carried out under allowable activity rules.

–Only genuinely low impact clearing should be allowed as an allowable activity under the LLS Act.

Land Management (Native Vegetation) Code (Native Vegetation Code)

- The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas. It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required). There is limited ability for Local Land Services (LLS) to refuse certification and prevent unacceptable and cumulative impacts on threatened species. The most recent figures (31 October 2022) indicate that total hectares approved for clearing under the Codes is more than 780,000 ha, (but not all approved clearing has been carried out).

- Purported environmental safeguards in the Native Vegetation Code are inadequate, meaning that the Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight.
- The scope of category 2 sensitive land is too narrow: Code-based clearing cannot be undertaken on category 2 sensitive land. While this provides some protection for environmentally sensitive areas, the scope of category 2 sensitive land is limited. For example, currently only 'core koala habitat' is categorised as category 2 sensitive land. In practice, 'core koala habitat' is limited in scope; any other koala habitat outside of this definition may be able to be cleared under the Native Vegetation Code.
- Only critically endangered ecological communities are off-limits to code-based clearing. Other categories of threatened ecological communities (e.g. vulnerable and endangered) may be able to be cleared under the Native Vegetation Code. This is unacceptable.
- Set asides are arbitrary and have little ecological basis. The use of an arbitrary set ratio for determining set asides requirements under the Native Vegetation Code is not ecologically sound. The Native Vegetation Code does not specify that the vegetation to be set aside should be the same condition (or of ecological equivalence) and what condition the vegetation should be in.
- Protections for threatened species are not stringent enough: The Native Vegetation Code states that clearing is not authorised under the Code if the person who carries out the clearing harms an animal that is a threatened species, and that person knew that the clearing was likely to harm the animal. Framed in this way, ignorance can provide an excuse; a person could claim they did not know clearing was likely to harm the animal. This safeguard could be strengthened by requiring that a landholder 'ought reasonably to know' that the clearing would harm a threatened animal species, such as the koala.
- Maximum clearing caps have expired: The Native Vegetation Code includes maximum limits on the amount of clearing that can be undertaken under Part 5
- Equity Code in the initial three-year period immediately following publication of the Code. This was included as a safeguard to prevent excessive clearing. However, the cap on maximum clearing was not revised once the initial three-year period expired, meaning there is currently no cap on clearing under the equity code.

Native Vegetation Panel

- The Native Vegetation Panel (NVP) is not operating as intended. The primary function of the NVP is to assess and determine clearing applications for clearing on rural land that cannot be carried out as an allowable activity or under the Native Vegetation Code. Since the commencement of Part 5A of the LLS Act, only one application has been lodged and determined by the NVP.
- The assumption therefore is that essentially all land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the Code. This raises questions as to whether the NVP and the overall Framework and approval pathways are operating as intended.
- Given land clearing rates, the failure of the NVP to operate as intended is concerning given the alternative approval pathways (allowable activities provisions and the Code) are less rigorous in terms of environmental assessment requirements. It also suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse.

The Native Vegetation Regulatory Map

- **The Native Vegetation Regulatory Map (NVR Map)** is a fundamental component of the framework

- it is intended to categorise land to determine if and where the rules apply. The NVR has not been finalised.

- Currently, transitional arrangements are in place. The published Transitional NVR Map only shows excluded land and the sensitive and vulnerable areas of regulated land (Category 2). The mapping for the vast majority of the state, which is supposed to be categorised as either Category 2 (regulated land) or Category 1 (unregulated land) is incomplete. For these areas, landholders are required to 'self-categorise' unmapped land in accordance with transitional arrangements. Again it is extraordinary that after 5 years these maps have not been finalised.

- An incomplete map makes an already confusing regulatory scheme even more difficult to navigate for landholders and members of the public alike, and transitional provisions are open to misuse.

Monitoring, reporting, compliance and enforcement

- **Monitoring and reporting**

- Monitoring of and reporting on land clearing is important for understanding how much clearing is occurring across the state and what impacts clearing is having on biodiversity

- Detailed information would allow the community to better understand where land clearing activities are being undertaken lawfully, and where illegal clearing may be occurring.

- A public register is a useful tool for ensuring transparency and accountability. Public registers can be used to monitor any potential 'stacking' of clearing actions and cumulative impacts of clearing actions on individual landholdings, or at a regional or landscape scale. Compared to the previous regime under the Native Vegetation Act 2003 (NV Act), there is a significant reduction in information included in public registers under the new framework. This is essentially because most clearing is now undertaken as code-based clearing, or via allowable activities provisions. The LLS Act only requires reporting on aggregated information for code-based clearing that requires notification or certification, or an annual estimate of allowable activities. The lack of similar detailed information for notification and certification applications under the Code means monitoring and reporting is less transparent.

- A lack of effective monitoring was highlighted by the Audit Office, which found that the LLS undertakes only limited monitoring of whether landholders are meeting the requirements of the Code, including whether set-asides are being established and managed appropriately.

- The Natural Resources Commission has recommended that the roles and responsibilities for monitoring and enforcing the Code (between LLS and EPA) needs to be reviewed; and monitoring of compliance with certifications and notifications to clear, including the establishment and management of set asides, under the Code needs to be strengthened, including increasing transparency.

- **Compliance and enforcement: ensure the laws are implemented**

- As with all regulatory regimes, appropriate monitoring and enforcement is vital to ensuring the aims and objectives of the laws are being met.

- The Audit Office reported that clearing of vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak and there is

no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals.

- The Audit Office found that there are lengthy delays in assessing compliance because identifying breaches requires satellite imagery to be compared against clearing authorisations and exemptions to identify and investigate potentially unlawful clearing.

- The Natural Resources Commission advised that as a priority, the NSW Government should develop processes to report up to date data on unexplained clearing every six months and also review the drivers behind high rates of unexplained clearing and implement measures to address any issues.

- While any person can commence civil enforcement proceedings in the NSW Land and Environment Court to enforce the law, it is the regulator that has the power to enter premises for the purpose of investigating whether the law has been breached and gathering evidence to support criminal or civil legal action. It can be extremely difficult for a member of the public to determine whether observed clearing is lawful because the NVR Map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property.

4. Overarching concerns with the land management and biodiversity conservation framework and statutory review process

• Part 5A of the LLS Act facilitates broad-scale land clearing

- Land clearing data shows that since Part 5A of the LLS Act commenced a significant increase in rates of native vegetation clearing for agriculture; data shows that land clearing rates for woody vegetation across NSW have increased from 8500 ha in 2011 to 27,100 ha in 2017, 29,400 in 2018, 23,400 in 2019, and 13,000 in 2020. Additionally, in 2020, 46,100 ha of non-woody vegetation was cleared for agriculture on rural land.

- This significant increase in land clearing rates triggered the government's own internal review process in October 2018, yet policy settings remain largely unchanged.

• Policy objectives

- The objective of Part 5A of the LLS Act is 'to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development' (LLS Act, s 3(e)).

- Notably, the replacement of the NV Act with Part 5A of the LLS Act removed the objective of preventing broadscale land-clearing and the requirement to ensure clearing 'improves or maintains environmental outcomes' – either at the site scale or at the landscape scale. The replacement land management framework established by Part 5A of the LLS Act introduces a system that is less stringent (allowing increased clearing), less evidence-based (with more reliance on self-assessment) and less accountable (with less detailed information available on public registers).

- Current policy objectives are not ambitious enough to reflect the current environmental context in NSW. Since Part 5A of the LLS Act commenced:

- The 2021 NSW State of the Environment report has confirmed that the number of species considered at risk of extinction continues to rise and permanent clearing of native woody vegetation in NSW has increased about three-fold since 2015 and stands at an average of 35,000 ha cleared each year.

- Severe drought, followed by catastrophic fires and unprecedented floods have greatly impacted the NSW landscape

The more appropriate policy objective for the LLS Act would be a clear objective to reduce broadscale land clearing and commitment to improve biodiversity outcomes.

- Current policy objectives do not align with other NSW government policies. For example, the NSW Koala Strategy aims to double koala numbers in NSW by 2050, yet Part 5A continues to facilitate the clearing of koala habitat (despite some safeguards for 'core koala habitat').

- Current policy objectives of the LLS Act are also not ambitious enough to align with broader, global objectives to reduce, halt and reverse forest loss and land degradation by 2030 (Glasgow Leaders' Declaration on Forests and Land Use) or reverse biodiversity loss by 2030 (Leaders Pledge for Nature)

- **Independent analyses have highlighted significant concerns with the implementation of the framework**

Some of these (Audit Office and NRC) have been highlighted above.

- **The statutory review process**

- Section 212(2) of the LLS Act explicitly states that the review of Part 5A of the LLS Act is to be undertaken in conjunction with the review of the Biodiversity Conservation Act. Why is this not happening?

- It is not clear how the terms of reference for either the review of Part 5A of the LLS Act or the review of the BC Act intend to examine the legislative framework as a whole and determine whether checks and balances across the framework are sufficient.

Yours sincerely

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Conservation Officer

Hastings Birdwatchers Inc

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