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Dear Dr Craik

Local Land Services submission to the review of interactions between the *Environmental Protection and Biodiversity Conservation Act 1999* and the agriculture sector

I am writing to you to provide information on the Local Land Services approach to streamlining and simplifying the interactions between the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and agricultural activities in NSW. The content of this submission is restricted to the activities of Local Land Services in providing approvals for agricultural land management under the Land Management (Native) Vegetation Code, established under the *Local Land Services Act 2013*.

The submission does not cover interaction between the EPBC Act and any other areas of regulation in NSW, nor does it reflect the views of other agencies in NSW. The restricted nature of the review means Local Land Services is best placed to provide detail on the NSW approach, and how landholders in NSW are impacted by the current overlapping regulatory regimes.

Local Land Services and the Commonwealth Department of Energy and Environment (DoEE) have been working together to develop tools that will assist in clearly articulating the risks of impacts on matters of national environmental significance (MNES). LLS is well placed to finalise the development of the tools and undertake a pilot on a risk based approach ahead of the broader EPBC Act legislative review scheduled for later next year, as we have significant on ground resources who are already working directly with landholders across NSW.

Once the tools are completed, NSW will be able to run a pilot for three to six months, over summer, followed by a month for evaluation. This provides an opportunity to gather clear evidence on a possible approach that can be taken into consideration during the statutory

review of the EPBC Act in 2019, and provide a blueprint for a more streamlined approach within existing State based frameworks.

The implementation of the review's recommendations for agriculture before the statutory review of the EPBC Act is crucial. In this context it will be important to demonstrate short term achievements as a result of the review, and the NSW pilot provides an obvious opportunity. In order to ensure that the works are undertaken in a timely fashion, and are consistent with recommendations from the review, you as Chair of the Review, should play a key role in oversight of the process, and evaluation of the outcomes of the pilot, and any other recommended actions arising from the review.

We look forward to discussing the approach NSW is taking, and identifying opportunities to improve outcomes for both NSW and the Commonwealth in managing environmental risks while improving outcomes for landholders and economic benefits from improved agricultural productivity across Australia.

Kind regards,

David Witherdin
Chief Executive Officer

NSW Local Land Services submission to the review of the interactions between the *Environment Protection and Biodiversity Conservation Act* 1999 and agricultural sector

Published by the Local Land Services

LLS submission to the review into the interactions between the *Environment Protection and Biodiversity Conservation Act 1999* and the agricultural sector

Executive Summary

Biodiversity conservation on agricultural land in NSW is subject to State and Australian Government regulatory systems. This imposes an unreasonable regulatory burden on NSW landholders.

Dual regulatory systems

The NSW Government introduced the Land Management (Native Vegetation) Code 2018 (the Code) to regulate land management on agricultural land. The Code provides a simple regulatory path for landholders who wish to clear native vegetation, protects biodiversity (as part of a suite of conservation legislation), and supports positive economic, social and environmental outcomes. The Code includes set aside provisions that provide beneficial impacts from some land management activities. Implementation of the Code is currently supported by 65 onground officers who provide direct support and extension for landholders.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) also regulates biodiversity on agricultural land. Unfortunately, the test for significant impacts under the EPBC Act is difficult to self-assess. As a result, landholders are forced to refer actions that are unlikely to have significant impacts to Matters of National Environmental Significance (MNES) or are highly likely to be approved by the Australian Government because of the beneficial impact of set asides. This provides no benefit for MNES, at a high cost to landholders.

Reducing the regulatory burden - a risk based approach

Local Land Services (LLS) seeks support from the Australian Government to continue to apply, and refine with Department of Environment and Energy (DoEE) collaboration, a risk based approach to identifying significant impacts on MNES on agricultural land in NSW as part of a Land Management Framework that includes actions by landholders under a Land Management Code alongside significant conservation incentives. The risk approach ranks and constrains actions in terms of their expected environmental effect. LLS expect that this structural risk management should reduce the need to refer an action under the EPBC Act during the implementation of the Code.

A refined risk based approach will develop mapping and information tools that LLS officers can use to identify MNES habitat that may be impacted by actions under the Code. When a landholder seeks a certification to carry out activities under the Code, LLS officers will use these information tools as part of their site visit to assess the risk to MNES from the proposed action. Where appropriate, LLS officers will recommend that an action be altered to avoid a high risk of significant impacts, or that the action be referred to the Australian Government.

This approach will simplify the regulatory process and reduce costs for landholders; reduce the number of referrals DoEE receives for actions that present a low risk to MNES; and improve landholder engagement with the EPBC Act, delivering better outcomes for MNES.

Better outcomes through regulatory cooperation

Local Land Services are well equipped to enhance the delivery of the EPBC Act in agriculture in NSW.

LLS has a range of policies and procedures that support NSW biodiversity conservation legislation which can be amended to include the EPBC Act. Our organisation has the human, intellectual, and administrative resources required to manage matters of interest to EPBC Act in agriculture in NSW. LLS officers are highly qualified, with the majority holding a minimum of tertiary qualifications in natural resource management, agriculture or related fields, with a number holding doctorate qualifications. In addition to technical qualifications, the majority of officers have significant experience in on-ground work with landholders, and experience with the local ecological communities.

Ongoing cooperation between the Australian Government and LLS will enable LLS officers to assist with the delivery of outreach, advice and guidance, and assist with due-diligence under the EPBC Act. This will improve regulatory outcomes under the Code and the EPBC Act and deliver better land management outcomes for landholders in NSW.

Recommendations

This submission makes short, medium and long term recommendations that will support cooperation and enable the implementation of the proposed risk based approach. The recommendations are summarised below.

1. **The Australian Government and LLS commit to a cooperative approach to biodiversity regulation on agricultural land in NSW**

2. **The Australian Government should continue to work with LLS to clarify how the risk based approach used in NSW can resolve the significant impacts on MNES to meet the outcomes of both NSW and Commonwealth legislation.**

3. **The Australian Government should prioritise the development of clear concise policy guidance for all MNES to ensure that guidance is available for all matters.**

4. **LLS acknowledge that processes are currently underway to coordinate and consolidate the listing processes between the States and Australian Government. However, LLS recommends that all listings are subject to specific onground testing, including on private land, prior to implementation, or during review, to ensure that the operation of the listings meet the intended outcome, and are not capturing areas that do not meet the high conservation intentions.**

5. **The Australian Government should make a policy decision to treat set asides as a mitigation activity that can be considered in the determination of significant impacts, to streamline assessment and approval processes for activities that may require referral.**

6. **The Australian Government should provide resources to support better extension of EPBC Act requirements to landholders. In NSW the most efficient approach would be to leverage the existing LLS networks, and support implementation of the NSW risk based approach.**

Contents

Introduction

This submission is made by NSW Local Land Services (LLS). We work with land managers and the community across NSW to improve primary production within healthy landscapes. We are focused on helping people make better decisions about the land they manage and assisting rural and regional communities to be profitable and sustainable into the future. We provide on ground support to NSW landholders in the areas of natural resource management, management of pest animals and plants, soil conservation and managing their native vegetation.

Context

In 2017 the NSW Government implemented significant biodiversity legislative reform. This reform was underpinned by an independent review into biodiversity (Byron et al, 2014), that provided 43 recommendations to improve biodiversity outcomes in NSW. These recommendations included a focus on risk based approaches to regulation of native vegetation. The government's response to this report included changes to native vegetation management and clearing, and private land conservation legislation.

Amendments to the *Local Land Services Act 2013* have objects consistent with the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), specifically 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. The Land Management (Native Vegetation) Code 2018 (the Code) administered by LLS was one outcome of that reform. It supports landholders to manage their land to ensure more productive farming methods and systems, while responding to environmental risks and obligations.

LLS is focused on ensuring application of the Code is efficient and appropriate. Helping landholders deal with their additional (and in many cases overlapping) obligations under the Australian Government's EPBC Act is a key priority. However, the dual regulatory system is currently unnecessarily complex, onerous and potentially costly for landholders.

The Independent Review into the interaction between the EPBC Act and agriculture is an important opportunity for looking at ways to harmonise the NSW and Australian Government's regulatory approaches, to reduce the burden on NSW landholders.

This submission

This submission:

- Provides an overview of agricultural land management in NSW (including interaction with the EPBC Act and key challenges for landholders)
- Outlines an extension to the current risk based approach to sustainable land management to greatly increase efficacy of EPBC Act implementation and provide reassurance to landholders. This approach aims to allow both landholders and regulatory agencies to move forward with certainty
- Evaluates the proposed risk based approach
- Proposes improvements in regulation of the agricultural sector to reduce the regulatory burden landholders experience as a result of current EPBC Act process requirements

Agricultural land management in NSW

This section provides an overview of the land management framework in NSW, operation of the Code, interaction with the EPBC Act, and key challenges for landholders.

Land management framework

The Code is part of a new Land Management Framework in NSW (see **Text Box 1**) which was developed in response to an Independent Panel review of biodiversity conservation legislation (Byron et al 2014). Previous approaches to managing biodiversity were deemed to be too complicated and expensive for farmers, without necessarily leading to the best environmental outcomes at a landscape scale and especially on agricultural land.

The Independent Panel made 43 recommendations for Government to consider. Important ones for agriculture included:

- Levelling the playing field for landholders (recommendation #1)
- Supporting landholders and promoting best practice for agricultural land management activities (recommendation #2)
- Taking a risk based approach to regulation (recommendation #11)

The Code (made under the *Local Land Services Act 2013*) is a key part of the response to these recommendations. It aims to:

- Allow landholders to improve productivity while responding to environmental risks
- Simplify the regulation of clearing of native vegetation
- Provide more options for landholders to better manage native vegetation
- Provide for positive economic, social and environmental outcomes
- Provide a framework for LLS to work productively with landholders to achieve triple-bottom-line outcomes

The Code supports landholder decisions and actions to better manage native vegetation for environmental, economic and social outcomes but it is only part of the Land Management Framework that includes three initiatives for biodiversity outcomes:

- The Biodiversity Conservation Trust which will invest $240 million to support working with landholders, farmers and other organisations that wish to participate in private land conservation
- An improved scheme for biodiversity offsets and private land stewardship
- The Saving our Species program that aims to secure threatened plants and animals in the wild in NSW

EPBC Act and the Land management framework

In terms of Australian Government legislation, the EPBC Act has operated in isolation of biodiversity management on agricultural land in NSW.

There has been limited extension advice to impacted landholders, many of whom were unaware that there was a need to seek approval from the Commonwealth, separate to approvals provided under NSW legislation. This is especially true for landholders who had approved actions under the NSW *Native Vegetation Act 2003*. Even for those landholders aware of their obligations there is uncertainty as to when actions would require an approval under EPBC Act. These omissions are a failing in the system up until recently, when LLS has been engaging with landholders on their broader approval requirements.

Active on-site engagement by LLS staff is an opportunity to assist landholders with their obligations under the Australian Government's EPBC Act.

Text Box 1: New Land Management Framework in NSW

The new Land Management Framework implements the Independent Panel's recommendations following its review of biodiversity conservation legislation in NSW. The new Land Management Framework replaces the:

- *Native Vegetation Act 2003*
- *Threatened Species Conservation Act 1995*
- *Nature Conservation Trust Act 2001*
- *parts of the National Parks and Wildlife Act 1974*

with

- a new Land Management (Native Vegetation) Code 2018
- an amended *Local Land Services Act 2013*
- a new *Biodiversity Conservation Act 2016*

The Land Management (Native Vegetation) Code

The Code provides landholders with more options to better manage native vegetation on their property.

Local Land Services Act

The amended *Local Land Services Act 2013*, provides a new regulatory framework for native vegetation and land management activities in NSW, framed around the objectives of ecologically sustainable development. The amended Act:

- Categorises regulated and exempt land to provide certainty and clarity for landholders
- Creates Allowable Activities which simplify and expand the former routine agricultural management activities (RAMAs)
- Creates the Land Management (Native Vegetation) Code
- Establishes a Native Vegetation Panel
- Enables landholders to use the Biodiversity Offsets Scheme for agricultural development

Biodiversity Conservation Act 2016

The new *Biodiversity Conservation Act 2016* provides landholders with greater flexibility to manage the environmental impacts of agricultural development. The new Act:

- Establishes a Biodiversity Conservation Trust to manage a new Biodiversity Conservation Fund providing landholders and others with the option to pay for biodiversity credits to offset the environmental impacts of development, and/or generate credits via stewardship agreements
- Creates Private Land Conservation Agreements to invest $240 million over five years to support conservation on private land, with $70 million in ongoing annual funding thereafter.

The Code

Overview

The Code sits under the *Local Land Services Act 2013*. One of the objects of this 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*". This is consistent with the objects of the EPBC Act.

The Code enables management of native vegetation in a number of different circumstances (see **Text Box 2**). However, it also incorporates a number of important controls to limit impacts to biodiversity. These include:

- exclusion of the use of the Code in critically endangered ecological communities listed by the NSW Scientific Committee
- restrictions on how the Code can be applied to land classified as as vulnerable land, within riparian buffers, within NSW listed threatened species habitat, and landholdings with low percentages of native vegetation
- limits to the magnitude of treatment that is allowed on any given property over time

The Code is arranged in Parts that reflect a range of expected environmental risk. Actions in Part 5 and Part 6 require the use of set asides in exchange for the removal of native vegetation. Agreed set aside areas must be listed on a public register and actively managed to promote vegetation integrity in perpetuity.

At a more detailed level, the Equity part of the Code (Part 5, Division 4) requires LLS to only issue a code compliant certificate when reasonably satisfied by a landholder that EPBC Act approval is unnecessary or has been granted. This provides a direct link between the two schemes.

Where high impact actions are proposed, that is actions on regulated land that would be beyond the controls provided by the Code, approval from an independent Native Vegetation Panel is required. Approvals would set an obligation for landholders to assess and offset the biodiversity impacts of approved clearing via the NSW Biodiversity Offset Scheme.

Text Box 2: Summary of the Code

The Code enables the following management of native vegetation on regulated agricultural land, via the following treatment options:

- <u>Invasive Native Species</u> - enables the removal of listed invasive native species that have reached unnatural densities and dominate an area. These activities are to promote the regeneration and regrowth of native vegetation
- <u>Pasture Expansion</u> - enables the removal of woody native vegetation by uniform or mosaic thinning to promote native pastures and increase farm efficiency and productivity
- <u>Continuing use</u> - enables the continuation of lawful rotational land management activities that had been in place between 1943/50 and 1990, and between 1990 and the commencement of the new Land Management Framework
- <u>Equity</u> - enables the removal of paddock trees, compromised native groundcover, and native vegetation from regulated rural land in exchange for set aside areas containing remnant vegetation
- <u>Farm Plan</u> - enables the removal of paddock tree areas and clearing regulated rural land in exchange for set aside areas containing remnant vegetation and specified revegetation on unregulated rural land

Notification and certification

Depending on the extent of proposed clearing under the Code, landholders either need to notify LLS about the intended activity or seek certification. This process is part of the risk based regulatory approach where lower biodiversity risk activities are subject to notification while higher risk activities are subject to certification.

For example, low impact removal of invasive native species (Part 2, Division 1 of the Code) requires notification whereas moderate impact removal of invasive native species (Part 2, Division 2 of the Code) requires a mandatory code compliant certificate from LLS.

Current level of uptake

The Land Management (Native Vegetation) Code 2018 has been in operation since March 2018. As at 8 June 2018, 93 certificates have been issued for activity under the Code (see Table 1 for more detail).

Table 1: Activities certified under the Land Management (Native Vegetation) Code 2018

Treatment activity authorised by the Code	Number of certificates issued	Total area treated (ha)	Number of paddock tree areas (<500m^2) cleared	Total area set aside (ha)
Invasive native species clearing	11	18,706		
Thinning of woody vegetation	24	2,034		
Management of regrowth/ continuation of lawful land management practises	11	520		
Clearing of paddock trees	16	46	1,021	231
Clearing of native vegetation from regulated rural land	31	2,867		3,120

Issued certificates to date allow treatment actions on regulated land, although not all of this area is expected to have activities undertaken immediately. The majority of treatment areas in certificates (77%) are for the removal of invasive native species for pasture improvement. Much of this is likely to have a positive biodiversity outcome. Just 12% of the area approved for treatment involves removal of native vegetation for agricultural practices.

Some parts of the Code require setting aside of land. As a result of activities approved under the Code to date, a total of 3,351 ha has been set aside in perpetuity. These parcels of native vegetation have agreed and documented active management plans with management actions aimed at ongoing improvements to native vegetation integrity. LLS has also implemented a mechanism using ecological process models to predict the likely biodiversity outcome of these management actions and expects to apply adaptive management in the future.

Many of the activities under the Code are not fundamentally different to those that have been possible under the previous NSW *Native Vegetation Act 2003* and before the EPBC Act commenced. These activities have been undertaken by landholders over many years, in many cases without reference to EPBC Act requirements, and with no interactions with the Commonwealth.

Local Land Services role in assisting landholders apply the Code

LLS plays an important role in assisting landholders apply the Code. LLS officers work at a regional level and have a strong understanding of the environmental values of their areas. They also understand the economic drivers for landholders and are able to work closely with them to achieve outcomes that are strong economically, socially and environmentally.

LLS procedures around assisting landholders are outlined in the following section on the risk based approach.

Code fact sheets

A range of fact sheets about the Code are publicly available. These are available at: https://www.lls.nsw.gov.au/sustainable-land-management/facts-sheets2.

Interaction with EPBC Act

Dual regulatory system

NSW landholders wanting to apply management actions to native vegetation on their property need to comply with both the Code and the EPBC Act. While both laws aim to protect biodiversity, contain ecologically sustainable development objectives, and include rules around when government approval may be required, the regulatory frameworks operate very differently.

The Code transparently sets out the situations in which it applies and the requirements that landholders must meet. The system is straightforward to navigate, particularly with the assistance of LLS officers.

The EPBC Act on the other hand operates around the principle of significant impacts to matters of national environmental significance (MNES). Where a significant impact is possible as a result of a new action under the Code, a landholder is responsible for making a referral to the Commonwealth to seek approval. The key issue for them is the challenge in understanding if and when a significant impact is likely, and relies on the engagement of expert consultants to support a clear decision. This can be very expensive and time consuming for landholders particularly if it becomes clear that there is no risk of a significant impact.

Due to these differences, a landholder cannot safely assume that compliance with the Code will equal compliance with the EPBC Act. LLS is working to support landholders to navigate this challenge. Where landholders do not engage with LLS, they will have no option but to navigate each regulatory framework separately and in isolation of one another.

Challenge in understanding significant impacts

The EPBC Act itself offers limited guidance appropriate for agricultural landholders on what is a significant impact. The relevant legislative provisions are brief and are unclear to landholders. The definition of significance is primarily provided by policy. In particular, EPBC Act significant impact guidelines 1.1 which set out the general considerations for determining significance. There is also a limited range of guidelines for specific species and ecological communities (e.g. guidelines for koalas targeted at specialist consultants). It is important to note that the majority of MNES do not have specific guidelines.

These guidelines are supported by high level mapping across Australia in the form of the Australian Government Protected Matters Search Tool (PMST) that identifies the possible occurrence of MNES. The PMST is a useful first step in helping proponents understand what may be relevant to their project by generating a list of MNES that may occur in the area. However, the mapping produces a list that is so precautionary, including even unlikely matters, and is often unhelpful to landholders applying the Code. This effectively then requires landholders to spend significant time navigating species listings advice to narrow and focus the protected matters listings, or to seek expert assistance to get a more definitive answer on whether their proposal is likely to require referral.

While a number of guidelines exist, there are still substantial gaps in the policy information available to landholders. Many species and ecological communities do not have published guidance about what may constitute a significant impact. And many of the guidelines that do exist don't set specific thresholds for significance.

This makes for case-by-case decisions dependent on the specific values of the MNES at the site being impacted and the nature of the impacts. Making these individual assessments has typically required engagement of a specialist consultant with experience in the requirements of the EPBC Act. However, because it is case-by-case there is an inherent lack of transparency and consistency in the decision making

process around significant impacts. This makes it extremely difficult for landholders to understand their requirements.

Different listings for species and ecological communities

One of the key challenges across Australia around biodiversity legislation is the different threatened species and ecological community listing processes and outcomes between the States and the Australian Government. In NSW this has been a particular problem around the different listings of ecological communities.

Landholders currently face a situation where they may need to assess the environmental values of their land in two different ways to satisfy the requirements of the Code and the EPBC Act because ecological community listings are different, particularly around condition thresholds. This issue is illustrated in **Text Box 3** and in the next section around challenges for landholders.

In addition to different listing challenges between the States and the Australian Government, the precautionary approach to listings is increasing the regulatory burden for landholders. This is because there is uncertainty around what is captured under condition thresholds, so listings tend to capture more condition ranges rather than less. This leads to lower condition areas being unnecessarily considered in the assessment process of significant impacts on MNES.

Lack of clarity around set asides

Section 75 of the EPBC Act creates a particular problem by not allowing the "beneficial impacts" of an action to be considered when a decision about significant impacts is being made. This means that where an inperpetuity set aside area with an active management plan designed to achieve positive native vegetation integrity outcomes is part of the risk management in the Code, this is not considered in the initial analysis of significant impacts under the EPBC Act (i.e. as a mitigation measure rather than as an offset).

There is little information available to determine whether the Australian Government can take a set aside into account when deciding whether or not an action has had a significant impact on a MNES. The implication of this is that while an activity under the Code involving treatment (plus a set aside) may lead to an acceptable biodiversity outcome, it could theoretically still require full referral, assessment and approval process under the EPBC Act, and ultimately result in a decision to approve an offset to compensate for a significant impact on a MNES. This process is clearly duplicative, with an opportunity to consider set asides under the Code as mitigation considerations of significant impact as a possible solution.

Consistency between the Code and the EPBC Act

There are important areas of consistency between the Code and the EPBC Act. The most important is the fact that both regulatory approaches focus on ecologically sustainable development and the sustainable use of natural resources. This creates a fundamental alignment in what the Code and the EPBC Act are trying to achieve.

Comparison between the Code and the EPBC Act

Table 2 provides a summary comparison between the Code and the EPBC Act against a range of regulatory elements.

Table 2: Comparison between the Code and the EPBC Act

Regulatory elements	Land Management (Native Vegetation) Code	EPBC Act
What does it regulate?	Management of native vegetation on agricultural land	Activities that impact Matters of National Environmental Significance (MNES)
What listed species does the regulation refer to?	Threatened species and ecological communities under the NSW *Biodiversity Conservation Act 2016*	The EPBC Act lists nationally threatened species, ecological communities, and other environmental values
How is the regulator involved in regulated activities?	Proponents require mandatory code compliant certificates to undertake some actions under the Code. LLS are involved in the certifying these actions	Proponents self-assess their actions. The regulator becomes involved once an action is referred to the DoEE by the proponent
What policy advice and guidance is provided for proponents?	The Code clearly sets outs what activities are authorised. LLS provide additional advice and guidance	Policy guidance has been developed for some but not all MNES
How transparent is the regulation process?	The Code clearly sets out what activities are authorised. LLS officers are required to discuss their decisions with landholders	Determination of whether an impact is significant is not transparent and often requires expert input
How is ESD considered in the regulation?	The Code is explicitly written to facilitate balanced triple-bottom-line land management and support economic development on agricultural land and expected economic, social and environmental outcomes are predicted for each instance of Code choice and configuration	The Minister is required to consider social and economic outcomes when deciding whether to approve a proposed action
How are offsets or set asides considered?	Set asides are required for certain divisions of the Code (i.e. those more likely to result in significant impacts on MNES)	Offsets are considered during the approval process, after a project has been referred and determined to have a significant impact
How is the regulation extended to the public?	LLS officers are present in regional centres, and consistently trained. Advice and guidance is available face-to-face, online and through fact sheets in LLS offices	Advice and guidance is available online
What are the typical costs for this regulatory process?	There are no application fees for the LLS service implementing the Code. LLS support for landholders is provided at no cost the landholder	Costs vary from around $15-20,000 for a simple referral to over $50,000 for an approval - most of these costs relate to the supporting specialist consultant reports required for referral and approval

Key challenges for landholders

The key challenges for landholders are summarised below and a specific case study is provided in **Text Box 3**.

Uncertainty and lack of transparency

As outlined above, there is uncertainty and lack of transparency around understanding significant impacts and navigating different listings of ecological communities (in particular condition thresholds).

Cost

Under the current operation of the EPBC Act, substantial expenditure on species and ecological community surveys and expert analysis are required to understand potential significant impacts and (if required) work through the referral, assessment and approval process. This cost falls to the landholder. Typically, landholders run small, high risk businesses with substantial overheads and small margins. The cost of seeking clarity on EPBC Act obligations can be not only onerous but prohibitive. The risk to the EPBC Act is high rates of non-compliance with limited enforcement capacity. Much better is a system that encourages landholders to assess and manage risk to MNES.

LLS also notes that even landholders who are prepared to undertake a referral, assessment and approval under the EPBC Act are constrained by the availability of qualified third parties within their region.

The cost of environmental assessment required for EPBC Act consideration in the agricultural sector is proportionally greater than for other sectors such as residential/industrial development and mining (i.e. assessment cost vs. development cost/benefit). The Productivity Commission (2013) confirmed that small businesses feel the burden of regulation more heavily than larger businesses.

Text Box 3: Natural Temperate Grassland case study

Natural Temperate Grassland of the South Eastern Highlands (NTG) was listed under the EPBC Act as a critically endangered ecological community in 2016 (this community is not listed as a threatened ecological community in NSW). The listing includes a map that shows a wide if patchy potential occurrence of the habitat type that is dominated by perennial tussock grasses but with wide variation in specific structure and species composition at the site scale. The listing description appears intentionally broad to capture many possible occurrences for a habitat type that is difficult to define precisely.

This presents a challenge for landholders where NTG could occur. Typically, they are managing native vegetation through livestock grazing as part of their production system, activities that may already support viable parcels of NTG. However, if they wish to implement the Code to help develop their landholding, at what point does the vegetation classify as NTG?

LLS have developed a case study to highlight these questions through compositional analysis of the interaction of the NTG listing and paddock scale plant survey data from the Monaro region. In particular, the discrepancy between intended listing capture of NTG that 'retains sufficient conservation values to be considered as a MNES', and the reality of areas with significant agricultural disturbance of low conservation value being captured under the listing.

The paddock data was collected by local grassland expert Mr David Eddy, prior to joining LLS, from more than 40 sites across the Monaro region with the majority of sites sampled repeatedly between 2008 and 2014. Mr Eddy is widely regarded as one of the Monaro region's leading grasslands ecologists, with some of his published work referenced within the NTG Conservation Advice. The analysis was undertaken by Mr Eddy and the LLS Applied Science Team.

The initial analysis focused on the NTG composition that help define the 'minimum thresholds of the ecological community to be subject to the referral, assessment and compliance provisions of the EPBC Act' by comparison with assessment onground of low, medium or high conservation value.

The conservation values ascribed to the data set are based on a range of conditions within an agricultural disturbance context. For example, low conservation sites are a result of disturbance history from grazing, fertilisation and oversowing of improved pastures into native pastures. High conservation sites are sourced from an agricultural grazing enterprise with less historical disturbance; these sites are not benchmark undisturbed grassland sites.

Samples of plant species composition from sites designated as low, medium or high conservation value cluster more closely than is expected by chance with low conservation sites forming a discrete cluster (Figure 1). However, almost all of the samples from low conservation sites triggered the condition thresholds of the NTG listing – i.e. low conservation native grassland sites from the Monaro region are meeting the 'minimum thresholds of the ecological community to be subject to the referral, assessment and compliance provisions of the EPBC Act'.

These sites were triggering Method B of the NTG listing condition thresholds. Specifically, the low conservation sites were exceeding the number of non-grass native species, indicator species and floristic value scores.

The key finding of the analysis is that many areas of native grasslands on the Monaro considered to be low conservation value due to historical agricultural disturbance are captured under the NTG condition thresholds.

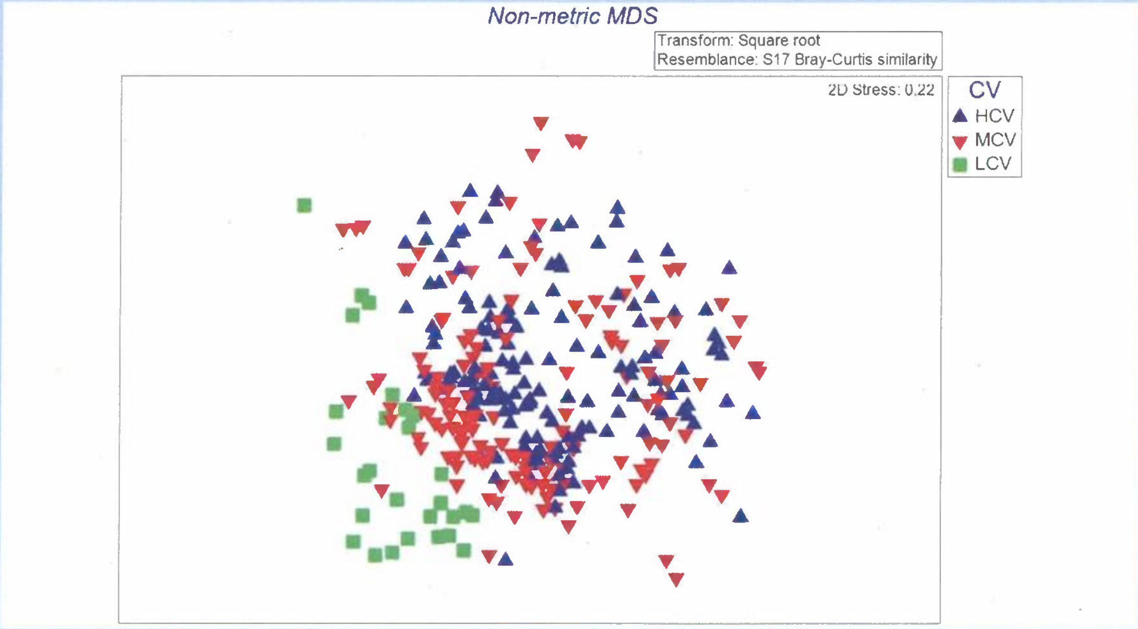

Figure 1. Non-metric multi-dimensional scaling plot of plant species composition resemblance (Bray-Curtis similarity, on transformed abundance) from 328 samples taken from 42 separate grassland sites in multiple years. All pairwise comparisons between groups differ significantly (ANOSIM, all R values>0.04, P<0.001).

LLS risk based approach

LLS is seeking to work with the Australian Government DoEE to refine LLS' existing risk based approach to determining significant impacts on MNES to assist landholders determine which activities under the Code require referral under the EPBC Act. This is a key priority as part of LLS' customer service role for landholders. It will also significantly help the Australian Government in achieving positive outcomes for MNES on agricultural lands in NSW, compared to the status quo of low awareness amongst agricultural producers of their obligations under national environmental law.

LLS has developed significant scientific capacity and on-ground experience across regional NSW. It applies a risk based system that NSW is confident aligns with the requirements, objects, and broad policy principles of the EPBC Act. It is critical to note that LLS is not seeking to change the outcomes of the EPBC Act. Rather, LLS is proposing a pragmatic solution (that can be delivered through policy) that addresses key issues facing both landholders and the Australian Government in the agricultural sector.

This section presents the rationale for a risk based approach and an overview of the process.

Rationale for a risk based approach

Implementation of a risk based approach to assist landholders meet their EPBC Act requirements is practical and appropriate. It can address the challenges faced by landholders in meeting their dual regulatory requirements while ensuring necessary protection for MNES. The NSW Government supports the Australian Government's own regulatory expectations (see **Text Box 4**). Poorly administered regulation and overlapping requirements can impart a burden on landholders that far outweighs any positive outcomes delivered. The risk based approach proposed by LLS will reduce the regulatory burden for landholders and streamline government processes in NSW through collaboration with DoEE.

The Productivity Commission's (2016) review into regulation in agriculture also emphasised the need for native vegetation and biodiversity conservation regulations to be risk based (so that landholders' obligations are proportionate to the impacts of their proposed actions).

Text Box 4: Australian Government regulatory expectations

Guide to regulation

The Australian Government Guide to Regulation (PM&C 2014) provides the framework for policy making and seeks to ensure that regulation is never adopted as the default solution. Businesses, community organisations and families pay the price of poor regulation, so the guide sets out ten principles to test the necessity of, consider alternatives to, and assess the positive and negative impacts of regulation.

Whilst all ten principles of the Guide apply to regulators, the most relevant to this issue are:

Principle 6 – Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens

Principle 7 - The information upon which policy makers base their decisions must be published at the earliest opportunity

Principle 8 - Regulators must implement regulation with common sense, empathy and respect

Principle 9 - All regulation must be periodically reviewed to test its continuing relevance

Regulator performance framework

In order to achieve the Australian Government's goal of reducing the burden of regulation, the Regulator Performance Framework (Commonwealth of Australia 2014) seeks to improve the performance of regulators. This includes supporting regulators to adopt consistent, risk-based approaches to administering regulation. This is directly relevant to the interaction of the EPBC Act and the Code.

Overall, the Regulator Performance Framework aims to encourage regulators to undertake their functions with the minimum impact necessary to achieve regulatory objectives and to effect positive

ongoing and lasting cultural change within regulators. This can include adapting their approach (for example) to reduce burdens on small business.

In terms of regulatory performance, the annual performance of each Australian Government regulatory agency is assessed using the Regulator Performance Framework (Commonwealth of Australia 2014). This is done against outcomes-based the following key performance indicators (KPIs):

KPI 1- regulators do not unnecessarily impede the efficient operation of regulated entities

KPI 2 - communication with regulated entities is clear, targeted and effective

KPI 3 - actions undertaken by regulators are proportionate to the risk being managed

KPI 4 - compliance and monitoring approaches are streamlined and coordinated

KPI 5 - regulators are open and transparent in their dealings with regulated entities

KPI 6 - regulators actively contribute to the continuous improvement of regulatory frameworks

EPBC risk pathways

While there are challenges for landholders in determining potential significant impacts to MNES, there are a clear set of risk pathways that help determine which activities are higher risk versus lower risk (in terms of potential significant impact).

Defining these pathways enables EPBC risk, specifically, the risk of a landholder having a significant impact on an MNES through application of the Code without approval from the Australian Government to be understood and then managed. These pathways are the foundation of the risk based approach. LLS is strongly of the view that such an approach can be applied to help landholders refer the activities that need referral, and clearly identify the lower risk activities that do not require referral.

The risk pathways relate to the technical and legal aspects of determining potential significant impacts to MNES. They are consistently established through published EPBC policies, case law, and EPBC Act decision making precedents. They are also commonly applied by DoEE when recommending decisions around significant impact.

The pathways are highlighted in the EPBC Act fact sheet about agriculture (DoEE 2017) and include:

- Scale of impacts (larger scale is generally higher risk)
- Intensity and duration of impacts (more intense and longer lasting impacts are generally higher risk)
- The conservation status and site specific values of the MNES that is potentially being impacted. For example:
    - Critically endangered species and communities are generally at more risk than vulnerable ones
    - Impacts to breeding habitat are generally higher risk than foraging habitat
    - Impacts to important landscape features (e.g. good condition vegetation) are generally higher risk than impacts to other areas

The risk pathways are summarised in Table 3 along with the primary justification for the pathway. The use of primary justification is an important approach to identifying the link between risks and opportunities for policy change consistent with the non regulatory nature of the review, and future long term legislative change. There are clear policy options that can be amended to support LLS' risk based approach.

Table 3: EPBC risk pathways

EPBC Risk Pathway	Pathway description (i.e. what would happen in a typical or average situation)	Primary justification
Scale, intensity and duration of impacts		
Scale	Larger scale impacts are higher risk than smaller scale	Policy
Intensity	More intense impacts (e.g. clearing of all vegetation) are higher risk than less intense (e.g. thinning of vegetation)	Policy
Duration	Longer lasting impacts are higher risk than temporary impacts	Policy
MNES value		
Conservation status	Impacts to higher conservation status MNES (e.g. critically endangered) are higher risk than lower conservation status (e.g. vulnerable)	Policy
Breeding site	Impacts to a breeding site are higher risk than to foraging habitat	Policy
Connectivity corridor	Impacts to a connectivity corridor are higher risk than disconnected areas	Case law
Edge of range	Impacts to the edge of range of an MNES are higher risk than middle of the range	Policy
Upstream of sensitive receptor	Impacts upstream of a sensitive receptor are higher risk than areas where no sensitive receptors occur	Legislation
Identified in recovery plan	Impacts to an area identified in a recovery plan are higher risk than areas that are not identified	Legislation
MNES present	Impacts in an area where MNES are known to occur are higher risk than areas where no records exist	Legislation
Indicative landscape features (these need to be identified at a regional level and this list is indicative)		
Riparian areas	Riparian areas comprise significant areas of remnant vegetation in NSW and provide important habitat to a range of MNES. Impacts to riparian areas are higher risk than non-riparian areas	Policy
Wetlands	Wetlands support significant ecological diversity and provide important habitat to a range of MNES in NSW. Impacts to wetlands are higher risk than non-wetland areas	Policy
Tree hollows	Tree hollows provide critical breeding and roosting habitat for a range of MNES. Impacts to trees with hollows are higher risk than trees without hollows	Case law
Vegetation condition	Vegetation condition is often associated with habitat quality for MNES. Impacts to high quality vegetation are higher risk than impacts to low quality vegetation	Policy
Prior land use	Prior land use is a key surrogate for vegetation condition. Impacts to areas that not been intensely used are higher risk than impacts to areas that have been used intensely in the past	Policy

Table 3 is not intended to list an exhaustive set of EPBC risk pathways. EPBC risk pathways will vary between regions according to the types of species, communities and other matters that are present. The risk based approach will determine and draw on a more complete set of EPBC risk pathways as discussed below.

Overview of the risk based approach

LLS has followed several lines of enquiry on the overlap between the Code and the EPBC Act for landholders in NSW, including:

- Legislative and policy analysis
- Spatial analysis of MNES across NSW
- Review of previous EPBC decisions
- Examination of case studies of application of the Code across various regions
- Staff participating in pre-referral discussions with EPBC Assessment Teams on proposed Code authorization

Given understanding from this evidence combined with EPBC risk pathways, LLS is seeking the support of the Australian Government to further refine our risk based approach for helping landholders determine their risk of having a significant impact on MNES. Key to supporting this approach is the development of a Regional MNES Prioritisation Tool as outlined below.

The risk based approach is comprised of five main components (see Figure 2):

1. Regional MNES Prioritisation Tool
2. Pre-site procedures for LLS
3. Site procedures for LLS
4. Advice to landholders
5. Supporting processes around administration and quality assurance

These components are described briefly below. LLS can provide further details to the EPBC Review team if needed. This enhanced risk-based approach will allow on-ground LLS staff to work directly with landholders to identify whether the activities proposed to be authorised under the Code will require referral under the EPBC Act. Key components are:

- Use of established EPBC Act risk pathways to determine the level of risk for each activity under the Code (e.g. scale and duration of impacts, landscape features, MNES specific values)
- Application of spatial data and tools to prioritise important MNES areas (e.g. MNES mapping and the Australian Government Protected Matters Search Tool)
- Recommendations around avoiding higher value sites (e.g. critically endangered habitat, breeding sites, etc)
- Integration of EPBC policies around significant impact (where available)
- A focus on Code activities that require certification and a pragmatic, risk based decision that notifiable activities are substantially lower risk
- Recognising pre-EPBC Act rotational agricultural continuing use activities and infrastructure maintenance

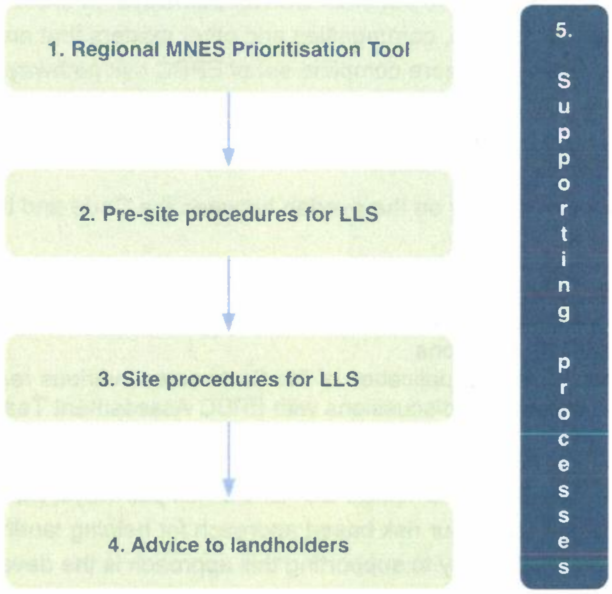

Figure 2: Components of the risk based approach

1. Regional MNES Prioritisation Tool

Purpose

The purpose of the Regional MNES Prioritisation Tool is to filter and prioritise MNES for each LLS region to identify the matters at most risk of significant impact. It enables LLS officers to quickly:

- Identify what MNES are potentially at risk when dealing with an application under the Code (and consequently which MNES are not relevant)
- Identify the relevant EPBC risk pathways for a region, action, or site
- Understand the specific activities that may lead to significant impacts for the relevant MNES

Description

The Tool is map based and supported by detailed EPBC referral guidance for specific MNES. The Tool is focused at a regional level to reflect the differing environments across NSW (via the 11 LLS operating regions).

Development of the Tool is based on the best available spatial information about the known and likely presence of MNES. It is also informed by any available EPBC policy or guidance documents, and any relevant decision making precedents.

Key features include:

- List of high and moderate risk MNES within an LLS region
- Maps to show known and likely habitat
- Description of each relevant MNES
- Referral guidance to clearly articulate what sort of impacts are potentially of concern. This includes consideration of the EPBC risk pathways and addresses:
  - Scale (i.e. thresholds for significant impact), intensity and duration of impacts
  - MNES values (e.g conservation status, breeding habitat, edge of range, etc)
  - Landscape features specific to the region (e.g. wetlands, riparian areas, vegetation condition, connectivity, etc)

Current state of development

The Regional MNES Prioritisation Tool is still in development. Both LLS and DoEE have developed versions of the tool. DoEE is working with LLS to undertake a pilot of their tool in the North West LLS Region. Further

work is required to make sure the filtering and referral guidance within the Tool are appropriate from both scientific and risk based perspectives. Establishment of pragmatic impact thresholds will be a critical step in this process.

The work then needs to be replicated across the other LLS Regions in NSW.

A risk based spatial tool would provide significant clarification for both LLS officers and landholders in determining what level of interrogation was required around specific proposed activities.

Outcome provided

The Regional MNES Prioritisation Tool is a key process in identifying the MNES that are at higher risk of significant impacts. It is an important first step in the risk based approach to provide clarity about the situations where referral may be required, and those situations where referral is definitely not required. The Tool will also play an important role in allowing LLS staff to influence proposed development design to avoid, minimise and mitigate significant impacts on MNES - a critical step prior to considering referral triggers.

The Tool has the potential to provide consistency and transparency to EPBC decisions, and focus the regulatory effort on the higher risk MNES.

2. Pre-site procedures for LLS

Purpose

The pre-site procedures provide LLS officers with the background information they need to help them focus their efforts on site, and provide advice and guidance to assist landholders make an informed risk-based decision whether or not to make an EPBC referral.

Description

The pre-site procedures are a set of steps that LLS officers work through when they receive an application from a landholder under the Code. The procedures also provide a record of due diligence regarding potential significant impacts on MNES, recognising that the onus of whether to refer is still with the landholder. The steps include:

- Applying the Regional MNES Prioritisation Tool to generate a list of moderate and high risk MNES for the property
- Searching for species records on the BioNet Atlas and the Atlas of Living Australia. This provides specific information about known sightings of identified threatened species and communities
- Compiling background information on the relevant MNES. This includes:
    - SPRAT profiles
    - Recovery plans
    - Conservation advices
    - EPBC policies
- Understanding the specific referral guidance for the moderate and high risk MNES. This helps focus the site visit to search for any relevant MNES values or landscape features
- Reviewing the most up to date vegetation mapping and imagery (aerial and/or satellite) for the property. This helps define the extent and potentially type of vegetation that is part of the Code application

Current state of development

The pre-site procedures are developed and are currently being applied by LLS officers.

Outcome provided

The pre-site procedures provide LLS officers with the information they need to be prepared for visiting the landholder's property, and to focus their efforts on the relevant EPBC risk pathways.

3. Site procedures for LLS

Purpose

The site procedures provide LLS officers with on-the-ground information about the landholding (including the area that is part of the Code application) to inform the risk based approach. This assists in understanding potential EPBC risks for landholders.

Description

LLS officers are required to undertake an inspection of the property to inform the EPBC risk based approach. They have significant experience in the environments of their regions which informs this process. Steps include:

- Examining the area to determine if any viable threatened ecological communities (TEC) are present. LLS have developed specific TEC guidelines to help determine if EPBC listed communities are present. The listings often include condition and patch size thresholds which need to be met for the community to be present
- Gathering information about the relevant MNES values and landscape features
- Determining the likely presence of threatened flora and fauna. This is particularly focused on areas of potential habitat and relevant habitat features of threatened fauna
- Considering on-site options with the landholder to avoid or mitigate any EPBC Risk

These processes are not intended to replicate a detailed ecological survey. Rather, as part of the risk based approach they are focused on gathering the relevant information to inform a risk based assessment of potential MNES presence.

Current state of development

The site procedures are developed and are currently being implemented by LLS officers.

4. Advice to landholders

Purpose

The purpose of this step is to provide advice and guidance to landholders about their EPBC risk. LLS does this in an advisory capacity, as the landholder is ultimately responsible for the decision to refer or not to refer.

Description

Using all of the inputs gathered about the activity and the property, LLS officers provide advice to landholders.

Where significant impacts to MNES are considered possible, LLS officers first priority is to look for potential alternative locations for the proposed land management actions that:

- Facilitate the economic opportunity that the landholder wants to pursue
- Avoid or mitigate the impacts to MNES

There may be multiple ways for the landholder to achieve their economic goals. LLS officers can play an important role in helping them work through the options to minimise environmental impacts.

In the case that significant impacts to MNES are still considered likely, the LLS officer provides advice to the landholder that referral under the EPBC Act may be required. This advice is supported by the detailed findings of the Regional MNES Prioritisation Tool, the pre-site visit, and the site visit.

Current state of development

The processes around providing advice to landholders are developed and are currently being implemented by LLS officers. They will need to be updated to incorporate the findings of the Regional MNES Prioritisation Tool.

Outcome provided

The outcome of this step is that landholders are clearly informed about their EPBC Risk and can make a risk based decision about if they want to make a referral for their activity.

The detailed findings of the Regional MNES Prioritisation Tool, the pre-site visit, and the site visit can be used by the landholder to refer the proposed activity to the DoEE. In circumstances where referral is required, the risk based approach provides a time and cost saving to the landholder and efficiencies to the DoEE to expedite pre-referral and referral stages of the current process. This is an important outcome for government and the community.

5. Supporting processes around regulatory delivery and quality assurance

Purpose

The supporting processes aim to ensure the risk based approach is implemented effectively through appropriate landholder engagement, resourcing, and monitoring and compliance systems.

Description

There are four components to the supporting processes. Each address a key aspect of successful implementation of a regulatory scheme and include:

- Landholder engagement
- Staff capacity and capability (including resourcing and training)
- Monitoring, evaluation and review
- Compliance and enforcement

Landholder engagement

An important focus for LLS is to engage positively and productively with the farming community in NSW. Landholder engagement is driven by a customer service culture delivered by regional based LLS officers.

In terms of the risk based approach, engagement includes:

- Background information on the LLS website
- Extension efforts in local communities to help landholders understand the Code
- One-to-one engagement with landholders when they apply the Code

Staff capacity and capability

Appropriate staff capacity and capability is critical to the success of the risk based approach. In particular this relates to adequate resourcing and training.

LLS is committed to implementing the risk based approach and helping landholders address their EPBC Act requirements.

Ongoing training of LLS officers is part of the risk based approach. This training includes material to help them:

- Understand the EPBC Act and how it interacts with activities under the Code
- Apply the tools and steps in the risk based approach
- Understand how significant impact judgements are made

Monitoring, evaluation and review

LLS will ensure that a high quality monitoring, evaluation and review (MER) scheme will be applied to the risk-based approach to understand how well the intended outcomes (environmental, social and economic) that are being achieved. It will be developed and implemented by the LLS Science Team.

Compliance and enforcement

Compliance and enforcement activity provides a credible deterrence to non-compliance and an incentive for doing the right thing. The NSW Office of Environment and Heritage (OEH) is responsible for compliance and enforcement relating to unauthorised native vegetation clearing under the Code. OEH detects clearing events through an annual satellite monitoring program and has gained additional compliance resources to work on monitoring and compliance action under the new legislation.

OEH prioritises unauthorised vegetation clearing matters using a risk-based approach based upon relative harm caused to the environment, mitigating and aggravating circumstances, the need to deter breaches of the law, and the public interest. OEH will also consider whether the alleged breach may have been permitted under the Code and the current opportunity to secure an environmental outcome through education and cooperation with landholders.

Where OEH believe vegetation clearing may also have impacted upon MNES, they advise DoEE through established mechanisms. OEH is not authorised to investigate or enforce alleged breaches under the EPBC Act. This must be carried out by an authorised officer of DoEE with appropriate training and experience. The two agencies have worked collaboratively on investigation and enforcement of a number of vegetation clearing cases unlawful under both regulatory schemes.

Current state of development

The majority of the supporting process have been developed and are being implemented. However, further work will be required as the risk based approach is finalised (e.g. to deliver training to LLS officers about the updated approach).

Outcome provided

The supporting processes provide confidence that the risk based approach will be implemented effectively, and provide a framework for continual improvement.

Evaluation of the risk based approach

Purpose of the evaluation

To ensure the risk based approach is appropriate, LLS has engaged independent experts to help develop and evaluate steps within the process. The experts include industry recognised specialists in EPBC impact analysis and expertise in international best practice environmental regulation.

The preliminary findings of the evaluation are set out in Table 4 below. These findings support the approach and the ability for LLS to help landholders understand and manage their EPBC risk.

The evaluation work will be ongoing as the risk based approach is further developed, implemented, and refined.

Table 4: Evaluation summary of the LLS Risk Based Approach

Evaluation questions	Summary of preliminary findings
1. Does the risk based approach meet the policy intent of the EPBC Act?	The EPBC Act provides a legal framework to protect and manage MNES and to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. The risk based approach is specifically designed to identify and encourage the protection of MNES. Avoidance of known MNES areas is encouraged and the set aside process provides for the long term protection of MNES through retention and management of vegetation.
2. Does the risk based approach provide for the identification, management and mitigation of significant impacts to MNES?	The core aims of the risk based approach are to identify potential significant impacts to MNES, and where significant impacts are likely recommend either avoidance of impacts or referral to the Australian Government. The information base supporting the risk based approach is considered appropriate. It is based on the best available landscape scale information about the presence of MNES, current EPBC Act policy guidance, and is supported by the expert local knowledge of LLS officers.
3. Does the risk based approach meet Australian Government regulatory expectations?	The risk based approach addresses Australian Government regulatory expectations (as set out in Text Box 3 above) by: Providing opportunities for the NSW and Australian Governments to collaborate to reduce unnecessary regulatory burdens (*AGGR Principle 6 – Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens*) Providing clear and targeted advice about what constitutes EPBC risk (*KPI 2 - communication with regulated entities is clear, targeted and effective*) Enabling open and transparent dealings with regulated entities (*KPI 5 - regulators are open and transparent in their dealings with regulated entities*) Incorporating streamlined and coordinated compliance and monitoring approaches between the NSW and Australian Governments (*KPI 4 - compliance and monitoring approaches are streamlined and coordinated*)
4. Can the risk based approach be implemented consistently and effectively by LLS and landholders?	The steps in the risk based approach are currently contained in written procedures for LLS officers. This supports consistent application to Code applications and is an accepted way of ensuring consistency in government process delivery. LLS officers in the regions are trained to work to procedures, including those to assist in the identification of regulated weeds, ecological communities, other vegetation classes, and landscape features. LLS is committed to implementing the risk based approach and helping landholders address their EPBC risk. There are currently 65 regional staff across NSW supported by an applied science branch and four upper management decision makers.
5. Does the risk based approach contain provision to be evaluated and improved?	The risk based approach will be evaluated to understand how well the Code is being implemented and the outcomes (environmental, social and economic) that are being achieved. LLS will undertake a review following the first 12 months of implementation of the risk based approach. The review will ensure the EPBC risk pathway approach remains calibrated and that the process continues to detect MNES risk and support effective land management.

Recommendations for the review process

There is a clear need to improve the interaction between the Code and the EPBC Act for agriculture in NSW. The dual regulatory system and the difficulty of determining the significance of possible impacts places an unreasonable burden on landholders. The risk based approach being delivered by LLS provides an opportunity to pilot a clear resolution to this problem.

There are number of changes that will improve the implementation of the EPBC Act on agricultural land and provide better outcomes for DoEE, MNES, and landholders. The following recommendations are made for the short, medium and long terms.

1. **The Australian Government and LLS commit to a cooperative approach to biodiversity regulation on agricultural land in NSW.** This will provide confidence to landholders that the dual regulatory system is being implemented as efficiently as possible, and that they won't be subject to unexpected compliance activity where they appropriately engage in the Code process.

2. **The Australian Government should continue to work with LLS to clarify how the risk based approach used in NSW can resolve the significant impacts on MNES to meet the outcomes of both NSW and Commonwealth legislation.** Collaboration on the approach is critical to ensure a pragmatic, evidence based, and risk oriented solution. This includes development of mapping resources and habitat requirement guidelines for MNES that are suitable for LLS officers to use to make referral recommendation.

3. **The Australian Government should prioritise the development of clear concise policy guidance for all MNES to ensure that guidance is available for all matters.** This will improve assessment of significant impacts and support accurate referral recommendations by LLS officers.

4. **LLS acknowledges that encourages processes are currently underway to coordinate and consolidate the listing processes between the States and Australian Government. However, LLS recommends that all listings are subject to , and would also support the specific onground testing, including on private land, of all listings prior to implementation, or during review, to ensure that the operation of the listings meet the intended outcome, and are not capturing areas that do not meet the high conservation intentions.** This would ensure that the operation of the listings meet the intended outcome, and are not capturing areas that do not meet the high conservation intentions.

5. **The Australian Government should make a policy decision to treat set asides as a mitigation activity that can be considered in the determination of significant impacts, to streamline assessment and approval processes for activities that may require referral.** This would ensure that landholders are not subject to unnecessary dual regulatory requirements.

6. **The Australian Government should provide resources to support better extension of EPBC requirements to landholders. In NSW the most efficient approach would be to leverage the existing LLS networks, and support implementation of the NSW risk based approach.**

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