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Options Paper - Agricultural Land Use
Planning Strategy

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OPTIONS PAPER

Agricultural Land Use Planning Strategy



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Introduction

The Right to Farm Policy Review found that there are ongoing issues impacting agriculture in land use planning. The NSW Agriculture Commissioner recommends an Agricultural Land Use Planning Strategy (Strategy) to address these issues. The Strategy would contain an Agricultural Land Use Planning Policy agreed by the NSW Government and specific measures to implement this policy. This document proposes a range of options that could be included in the Strategy.

The options in this paper have been developed based on recent reports (**Appendix 1**) and ideas raised by stakeholders. The options seek to address the following policy problems:

1. There is no definition, identification or development protections for State Significant Agricultural Land (SSAL) which is leading to this land being lost to non-agricultural uses;
2. There is no simple, accessible and impartial mechanism for farmers to resolve land use conflict regarding their operations;
3. The planning framework does not reflect the needs of agriculture; and
4. Local government plays a crucial role in regulating agricultural land use but can be risk averse and as a result can struggle to deliver broader NSW Government objectives to promote investment and jobs growth.

The NSW Agriculture Commissioner is seeking feedback on the options. A summary is included at **Appendix 2**. For each option, consider:

1. Do you support the option? Why/why not?
2. Do you think the solution will be effective in mitigating or addressing the relevant issue?
3. What changes might make the solution more effective?

You can submit your feedback by emailing agcommissioner@dpi.nsw.gov.au by 28 February 2021.

Thank you to those stakeholders who have already provide advice to inform this process, your perspectives have been valuable and will continue to be used to inform recommendations to the NSW Government.

Chapter 1: Minimise the loss of productive capacity

Policy problem: There is no definition, identification or development protections for SSAL, which is leading to this land being lost to non-agricultural uses.

Overview of agriculture in the NSW planning framework

Land uses are regulated by zones which are defined by the *Standard Instrument - Principal Local Environmental Plan (Standard Instrument LEP)*. Each zone has a list of permissible and non-permissible developments. There is no specific zone used for agriculture. Agricultural land is mostly zoned as RU1 Primary Production, RU2 Rural Landscape or RU4 Primary Production Small Lots, supported by zone objectives which encourage primary production. However, agriculture can also occur in other zones including R5 Large Lot Residential and E3 Environmental Management which are not primarily meant for agriculture. Comparative to residential or industrial zones, rural zones accommodate a broader range of development types from agriculture to residential and tourism facilities to mining and is often treated as the 'default zone' for land outside of urban settlements. Therefore, they can become catch-all zones where various potentially conflicting uses can be clustered together.

In comparison to other land uses, agriculture generally requires larger tracts of land and access to a variety of natural resources such as good soils and water, as well as access to markets, infrastructure and labour. For intensive operations there is also a need to accommodate buffers to avoid impacting sensitive receptors. Under the current zoning system agriculture competes for land with other land uses.

While the planning framework seeks to prevent the fragmentation of rural land, this is still occurring and is inevitable in some cases. Planning outcomes can significantly impact land values and effect opportunities for agricultural expansion. Planning outcomes can also change the landscape in ways that are not desirable. The cumulative impact of sub-division and fragmentation can have a serious impact on local agricultural production and supply chains.

The *Environmental Planning and Assessment Act 1979 (EP&A Act)* sets out the requirements for various layers of strategic planning that occurs via Regional Plans, District Plans and Local Strategic Planning Statements (LSPSs). Under the EP&A Act, LSPSs are required to implement Regional Plans. Planning proposals to amend local plans must also consider the LSPSs objectives. This hierarchy of strategic plans establishes clear objectives at the regional level but allows councils to consider and address local context in the planning process. Ideally, the strategic framework should clearly articulate the intended future use of rural land and recognise the importance of agricultural development. This provides the context for local decision makers. However, gaps in the strategic planning framework or evidence base can result in inconsistent interpretation and decision making, leading to adverse outcomes for important agricultural land.

Gaps in the planning framework for agriculture

Councils and the NSW Government do not always adequately consider agriculture, and the impacts of non-agricultural development on agriculture, in all levels of decision making. Councils may plan for agriculture on a site-by-site basis through planning proposals or via the development application process. These site-specific decisions do not routinely consider the best strategic use of the land and can lead to the fragmentation of rural land that can drive up land prices and impede agricultural expansion. The cumulative impact of sub-division and fragmentation can have a serious impact on local agricultural production and supply chains.

Without a State policy on agricultural land, councils can find it difficult to prioritise agriculture in the rural zone. There can also be no monitoring of the loss of productive agricultural land to understand the cumulative impacts of individual developments. Monitoring the loss of productive agricultural land could provide an evidence base on the scale of the issue, justify further action to protect agricultural operations, and lead to adjustments in land use policy settings, particularly in the coastal zones. There are both statutory and non-statutory options to resolve this issue, which are scoped below.

The following options explore both statutory and non-statutory solutions to address the following issues:

1. Omissions of policy about agricultural land use and its development
2. Need for greater understanding by council planners about the land use needs of agriculture
3. Need for more oversight of the impact of development on agricultural land
4. Ineffective zoning for agriculture's needs
5. The need to update the planning framework to respond to the changing needs of agricultural industries

Non-statutory mechanisms

To improve planning outcomes it is proposed that, the NSW Government should develop a Rural Land Use Planning Policy to acknowledge the importance of agricultural land, agricultural land use needs and provide guidance to councils about how this land should be developed.

Rural Land Use Planning Policy

The NSW Government should develop a policy on rural land.

A rural land use planning policy would provide the framework in which measures described in the options below could deliver improved planning outcomes. If the NSW Government were to agree to any of these options, a Rural Land Use Planning Policy would be the starting point.

A Rural Land Use Planning Policy could recognise the importance and location of agriculture and the land and resources on which it depends. The policy would apply to all rural land however adoption of the policy would be voluntary.

This policy should help councils understand how they can consider agriculture throughout all phases of the planning process. This could include Regional Plans, LSPs and other local land use strategies, as well as development applications.

This policy could establish a set of rural land use planning principles to ensure agriculture is acknowledged and prioritised where possible in strategic plans, where councils choose to support agriculture.

The principles could include the following:

1. Agricultural land should be maintained for ongoing agricultural production where possible.
2. Land use planning should protect and prioritise agricultural land where possible, recognising its social, economic and strategic value (value which includes the dependency of secondary agricultural businesses and retailers on agriculture) both immediately and for future generations.
3. Land use planning provisions should be proportionate to the quality of the land for agriculture and the scarcity of that quality of agricultural land in the region.
4. Strategic planning for rural land should consider and accommodate, where possible, agricultural trends, the importance of agriculture to the community and the economy and the unique issues facing agricultural businesses from time to time.
5. Non-agricultural land uses in rural areas should not detract from the long-term productive capacity of surrounding agricultural land and secondary industries, services and infrastructure that support agriculture.
6. Rural land use strategies should ensure non-agricultural land uses in rural areas maximise community benefit and minimise land use conflict and adverse impacts on agriculture.

The policy would validate the decisions of councils to prioritise agriculture in their Local Government Area (**LGA**) or to increase the level of consideration when investigating non-agricultural development on rural land. It would give councils greater certainty in decision making when balancing land uses on rural lands.

This policy could recognise the importance of agriculture in a local community, region and the state ensuring more consistency in how agriculture is considered in strategic planning.

Options 1 to 3 below could be done in conjunction with the policy.

Option 1. Identify Production Areas

The NSW Government could identify production areas across the State.

Some agricultural industries, particularly intensive ones, do not require high quality soil to be productive. Rather, they rely on other attributes such as climatic conditions, proximity to infrastructure, access to transport, power supply, processing facilities, markets and a supply of skilled labour. This can lead to a clustering of particular industries in well suited locations.

It is important to identify these production areas and ensure they are catered for in the planning framework. Recognising identified production areas would acknowledge the importance of interrelationships with upstream and downstream agribusiness. They would recognise the critical mass for industries and the viability of the entire industry chain.

Examples of an identified production area might be existing industry aggregations such as the poultry areas at Tamworth, apple production areas at Batlow, and forestry at Tumut.

Option 2. Monitoring and Reporting of Loss of Rural Land

The NSW Government could monitor land use change and the loss of rural land that is best suited to agriculture.

Rural land will continue to provide a source of land for urban use and commercial and public infrastructure which cannot be located within urban areas. In order to understand the impact of non-agricultural development on rural land suitable for agriculture, monitoring the loss of this land could be carried out by DPI. This might require DPI to be notified of planning proposals that re-zone certain rural lands or councils to report to DPI when development applications are approved in rural zones for non-agricultural use. This monitoring would inform councils in their strategic planning processes and provide an evidence base for further action if found necessary. Monitoring would need to be done in a practical and cost-effective way and would not be granular to reflect individual transactions. Monitoring would give an estimation of how much agricultural land is rezoned and would require periodic reviews of land use planning maps and GIS analysis.

Option 3. Education

The NSW Government could support local government planners to understand the needs of agricultural operations.

Improving the capability of local planners to understand agricultural practices and planning needs would improve consideration of agriculture in the planning process. Planners undertake assessments and make recommendations on proposals for agricultural activities or those which impact agricultural land. It is important that they understand the complexities and varying

needs of the diverse agricultural industries and have a consistent interpretation of the planning framework in assessing requirements. Currently it is up to the proponent to detail in their application the operational components of an agricultural development.

The NSW Government could offer more support to council planners on understanding the potential impacts of new agricultural developments, or conversely the impacts of non-agricultural developments on agricultural operations. These support services could include advice on clarification of industry requirements and interpretation of planning law. These support services could be coupled with an education program for local government planners and planning consultants to increase their understanding of the complexities and needs of agriculture and how these can be managed through the planning system.

Mechanisms requiring changes to the statutory planning framework

The following options could be progressed to strengthen the Rural Land Use Planning Policy and create more consistency in how the policy is applied across councils.

Option 4. State Agricultural Land Use Planning Policy

The NSW Government could implement a policy on all rural land, including mandatory considerations in the planning framework and fill the schedule in the State Environmental Planning Policy (Primary Production and Rural Development) 2019 (PPRD SEPP).

A State-wide policy could be established that changes the way planning authorities consider the impacts of development on all rural land and agricultural activities. The policy would not apply to agricultural activities or where producers undertake specified activities that are complementary to agriculture. This policy would be a *mandatory consideration* in the decision-making process.

The policy would provide guidance to planning authorities on how agricultural land uses must be considered in the strategic planning, planning proposal and development application stages of the planning framework. It would make sure councils consider how to avoid or mitigate potential adverse impacts of non-agricultural activities and reduce the risk of land use conflict.

Implementation of the policy could require additional matters to be considered when assessing non-agricultural development on rural land. The following statutory changes could be made to introduce these requirements:

- Amend Ministerial Local Planning Direction 1.5 - Rural Lands to require planning proposals for non-agricultural land use on rural land, or changes to planning controls for rural zoned land to consider agricultural planning principles/criteria and/or the findings of an agricultural impact statement (AIS);
- Amend the PPRD SEPP and/or the Standard Instrument LEP to require consideration of suitable alternative locations, the preparation and consideration of an AIS or, depending on scale, a land use conflict risk analysis for non-agricultural land uses on rural land; and
- Amend the PPRD SEPP and/or clause 5.16 of the Standard Instrument LEP to more clearly require consideration of whether potential impacts on agriculture from proposed non-agricultural development have been minimised.

These potential statutory changes would clarify and strengthen provisions to safeguard agriculture in the Standard Instrument LEP amendment and development application process. This approach would reinforce the importance of agriculture in the planning system but could remove some discretion and flexibility from rural land use planning.

Option 4a. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Criteria

The NSW Government could implement a policy on agricultural land, including mandatory considerations in the planning framework and provide councils with a list of criteria that defines SSAL in Schedule 1 in the PPRD SEPP for councils to make their own maps.

This option narrows the scope to apply the policy to land identified as SSAL and could include considerations for land surrounding SSAL.

Criteria for SSAL could comprise biophysical and climatic characteristics, as well as locational, or importance to other agricultural industries. The below components could make up SSAL:

- Biophysical Strategic Agricultural Land (BSAL)
- Expanded BSAL (up to 12% of the State)
- Irrigated lands
- Existing agricultural land mapped for its importance (i.e. North Coast farmland)
- Land zoned RU1 Primary Production, RU2 Rural Landscape or RU4 Primary Production Small Lots in the Metropolitan Rural Area.

The land above covers a range of land that is largely finite in supply (irrigated and BSAL) or provides other strategic advantages to agricultural industries not reliant on the land's biophysical characteristics. Identification of SSAL would enable stronger planning controls to be applied specifically to SSAL or require an RU1 Primary Production zone be applied to land identified as SSAL. These stronger planning controls could also be incorporated in considering developments on land neighbouring SSAL.

This option would rely on councils conducting their own mapping if a map was desired. Alternatively, proponents could be asked to verify that their land is not classified as SSAL land to avoid the policy applying if pursuing non-agricultural development. Such verification procedures may be onerous and require extensive soil analysis and research rather than reference to a map.

Option 4b. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Map

The NSW Government could implement a policy on agricultural land, including mandatory considerations in the planning framework and a map of SSAL in Schedule 1 in the PPRD SEPP.

Ad hoc agricultural land mapping has been conducted in some local strategic plans as a result of some councils wishing to protect agriculture in their regions. In other circumstances regional or State scale mapping has been completed to address particular issues, for example, BSAL mapping and the Far North Coast and Mid-North Coast Important Farmland Map.

A map would be beneficial to show how agricultural land interacts with other land use planning provisions, including sensitive areas such as biodiversity areas or areas used for mining. Mapping is becoming more and more integral to the planning system as a clear method of identifying land subject to specific planning controls, or which otherwise requires special consideration. Mapping SSAL gives certainty to the community and investors on which land agriculture is the preferred land use. There could be built in verification processes to ensure that landholders and councils can verify the accuracy of the map.

Mapping of SSAL also enables stronger development control provisions to be applied to this land, enabling more relaxed controls to be applied to other rural land which again provides certainty to developers and investors for both agricultural and non-agricultural development.

Provision of a State-developed map also means agriculture in LGAs where councils which **do not have the resources** to undertake mapping will also benefit from the policy. Proponents in these LGAs could verify that their land does not meet the criteria for the map to avoid the policy applying. Statutory amendments requiring planning decision-makers to consider the impacts on agriculture on or adjacent to this mapped land would supplement the map as per option 4a above. This would support councils in understanding how to use the map and improve consistency in how agriculture is considered.

Option 4c. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Map - councils opt in

The NSW Government could implement a policy on agricultural land, including mandatory considerations in the planning framework and a map of SSAL which is optional for councils to adopt.

As an alternative to State-wide application, the policy and map could be released with councils able to opt in or out of the amendments. The NSW Government would lead the first round of implementation to save individual councils undertaking planning proposals to introduce the map and controls into Local Environmental Plans. Afterwards councils could individually apply to DPIE – Planning to amend their local controls in a manner suited to their LGA.

This option provides the benefit of release of a map for councils lacking mapping resources, and saves proponents undertaking expensive studies to determine application. It also enables local consideration of the need for agricultural protections and an ability to monitor the loss of SSAL across the State.

Some State-wide amendments to SEPPs would still be necessary, such as exclusion of seniors living developments from SSAL, to ensure local requests for prioritisation of agriculture on SSAL are balanced against otherwise overriding State policy.

Option 5. Controlling Land Use in Rural Zones

The NSW Government could prohibit zone changes or non-agricultural uses on agricultural land except in certain tightly defined circumstances or through a stringent exceptions process.

The planning system has several levers which can be used to prescribe either where development occurs or how it is developed. These levers comprise prohibitions on land uses in certain areas, development standards that prescribe the form of a development, or matters

that must be considered when designing and assessing a development. This hierarchy of development control can be utilised in different ways to minimise the loss of productive agricultural land.

If SSAL is identified in accordance with options 4a, 4b or 4c above, unique planning controls could be applied specifically to SSAL. In the absence of identified SSAL in the planning framework controls would need to apply broadly to rural land.

The following statutory changes could be made to prohibit non-agricultural development on SSAL or in rural areas generally:

- a Ministerial Direction which requires SSAL to be zoned RU1 Primary Production when councils prepare a planning proposal applying to the land.
- a Ministerial Direction which prohibits the change of zoning of rural zoned land to a residential, business, industrial, environmental or special use zone.
- Amend the Standard Instrument LEP to prohibit particular non-agricultural land uses in the RU1 Primary Production zone.
- Amend the Standard Instrument LEP to prohibit any further subdivision of rural land to create new lots with dwelling eligibilities.

Option 6a. DPI approval of developments on SSAL and IPAs

The NSW Government could require councils to obtain approval from DPI and DPIE-Planning before deciding on the development of non-agricultural uses on SSAL and in IPAs.

If SSAL is identified in accordance with option 4a, 4b or 4c above, consent authorities could refer applications for non-agricultural developments on SSAL or in IPAs (see option 1 above) to DPI to seek formal concurrence. This will give the consent authorities a greater level of expertise to inform their decisions and certainty around NSW Government position.

DPI would be able to provide expert input on current agricultural issues to support the development consent process. Involving DPI in the development consent process for the best agricultural land in the State would reflect its significance and safeguard its future use for the benefit of the State. This option would mean that councils could rely on DPI's expertise to help make decisions about the best future use of SSAL. Such a process would be similar to the involvement of other State agencies in the development consent process for projects significant to the State or impacting other natural resources such as water or biodiversity. To avoid delays in the process, failure to respond within a given timeframe would amount to deemed approval.

Option 6b. DPI advice in relation to development on SSAL and IPAs

The NSW Government could require councils to seek formal advice from DPI for the development of non-agricultural uses on SSAL and in IPAs.

Rather than formal concurrence per 6a, this option would require consent authorities to seek and consider advice from DPI in relation to non-agricultural developments on SSAL and in IPAs. This would have the same benefits referred to above, but without a formal DPI concurrence role.

Chapter 2: Reduce and manage land use conflict

Policy problem: There is no simple, accessible and impartial mechanism for farmers to resolve land use conflict regarding their operations.

Land use conflicts occur where a neighbour (or other affected party) takes issue with the conduct of an existing farming operation. The first priority for the NSW Agriculture Commissioner when appointed in August 2020, was to conduct a review of the NSW Right to Farm Policy 2015 (**Review**). During the Review the Commissioner heard from councils that they are often the first port of call for complainants – even where the issue falls squarely within the remit of another agency, such as the EPA. For more information on the Review, see the Right to Farm Policy Review: Consultation Summary and Issues Analysis accompanying this document.

The development approval process can lead to lengthy delays and significant costs for applicants where a consent authority either requests unreasonable information or standards to be met in response to complaints against a new or expanded agricultural operation.

The options set out below seek to address the following issues raised in the Review:

1. There is no clear merits-based avenues to resolve agricultural land use disputes;
2. There is no low cost and accessible avenue to challenge decisions made by councils or other regulatory bodies;
3. There is a lack of understanding of agricultural operations in assessing and resolving complaints;
4. The onus is on the operator to appease the complainant.

Many participants in consultation called for a State-backed mediation service to hear and resolve disputes. Mediation services are already available in NSW through many courts and tribunals, through peak bodies such as the Australian Disputes Centre, Community Justice Centres, and through certain alternative dispute resolution practice groups like the NSW Small Business Commission. However, these services may not have specific agricultural disputes resolution expertise.

Agricultural disputes can be very technical in nature, often requiring complex expert reports into odour, noise, and other pollutants. The level of evidence required to establish the facts of any case are far and beyond what would be expected in a tenancy dispute or a standard family relationships dispute, for example. As a result, anybody adjudicating or conducting a mediation-arbitration process for an agricultural dispute cannot make sufficiently informed recommendations or determinations without the production of complex technical evidence, and even then, judgements may be required about whether specific conduct or practices are reasonable.

It is important that any new measures adopted by government are cost effective and do not impose additional red tape. The current arrangements have created a bureaucratic maze producing inconsistent outcomes in the perception of many, and there do seem to be good prospects for devising measures with net benefits. The overall impact on the economy and communities of disputes and foregone investments is the accumulation of a large number

of relatively small and local outcomes. While these operations can be smaller value than a mine or infrastructure, the cumulative overall impact can be much larger. A process which sets precedents and guides better decision making could therefore have a high return for the State.

Options 1 to 3 below deal with disputes over existing operations. Option 4 considers an alternative approach to development applications.

Options to improve operational dispute resolution

The NSW Government could explore all, or a selection, of the following avenues to improve dispute resolution in agriculture

Option 1. Expand the jurisdiction of existing dispute resolution bodies

Existing dispute resolution bodies could have their jurisdiction expanded to deal with agricultural land use conflict. This could involve the NSW Small Business Commission (SBC), NSW Fair Trading, or Community Justice Centres (CJCs).

The SBC provides a mediation service as well as negotiation and procedural advice to help resolve small business disputes. Mediation is provided for the following issues:

- Resolving disputes between small businesses, government agencies and local government
- Managing disagreements between contractors and subcontractors
- Franchise disputes
- Debt recovery and unpaid invoices.

There may be scope to add the resolution of disputes about existing operations to these services by creating a separate agricultural division. These would be limited to small farm enterprises but could potentially cover all types of nuisance disputes listed in the 2018 University of Technology Sydney's Report, 'Right to Farm Agricultural Land Use Survey'. Section 18 of the *Small Business Commissioner Act 2013* empowers the Small Business Commissioner to require a person to attend a meeting for the purpose of mediating a complaint involving a small business. Presumably this jurisdiction would extend to small business agricultural enterprises. As such, resolving small business agricultural disputes through the SBC may only require changes to practice and expertise as opposed to legislative changes.

NSW Fair Trading provides mediation services free of charge (with each party bearing its own costs) on a range of strata and community related matters including noise problems, by-laws, pets, insurance matters and many others. This mediation branch of NSW Fair Trading could also be expanded to include an agriculture specific service. It is likely that NSW Fair Trading will require a statutory mandate to broaden the scope of its mediation services.

CJCs are another potential avenue for resolving disputes about agricultural operations. It is not clear whether CJCs are being presently utilised for this purpose. CJCs help people resolve their disputes by providing free mediation services for a broad range of disputes including disputes relating to neighbours, family relationships, children, work and employment, business and consumers, money and debt.

In principle, CJs might provide an appropriate and cost-efficient forum for the mediation of operational disputes. CJs also specialise in disputes involving interpersonal issues such as those between neighbours. At the heart of some agriculture disputes would not only be transactional issues (e.g. waterways or odours) but potentially longstanding generational interpersonal disputes between neighbouring property owners. Additionally, if there are multiple owners of the same property due to inheritance (e.g. siblings); or where properties have been subdivided and are now considered neighbouring properties but owned by respective family members.

CJC could also assist parties to develop a pathway to resolution. For example, where there are long-standing or complex issues, perhaps due to a lack of communication and understanding between parties. This model could also include multiple mediations over period of three, six or even 12 months.

However, it is not clear whether there is sufficient agricultural expertise in CJs to give this option practical justification. CJC's have a broad jurisdiction and therefore this option should not require legislative changes, but instead require the development of additional expertise and guidance from the NSW Government to councils and others that CJs can be used for this purpose.

Option 2. Create a new dispute resolution body

A. Ontario Normal Farm Practices Protection Board / British Columbia Farm Industry Review Board - Model A

In the province of Ontario, Canada the Normal Farm Practices Protection Board (**Board**) was established under the *Farming and Food Production Protection Act 1998 (FFPP Act)* to hear and rule on issues pertaining to farm practices. The Board has the power to inquire into and resolve a dispute respecting an agricultural operation and to determine what constitutes a normal farm practice.

The FFPP Act provides that a farmer is not liable in nuisance to any person for a disturbance (odour, dust, flies, light, smoke, noise and vibration) resulting from an agricultural operation carried on as a normal farm practice. A 'normal farm practice' is defined by the Board. The Ministry of Agriculture, Food and Rural Affairs will attempt to resolve the dispute before it is escalated to the Board. The members of the Board represent a range of agricultural industries and experts.

The British Columbia Farm Industry Review Board (**BCFIRB**) is a similar model. The BCFIRB hears complaints about odour, noise, dust or other disturbances arising from a farm practice and determines whether it is a 'normal farm practice'. If a determination is made that a certain practice is not a 'normal farm practice', the farm business loses protections provided under the *Farm Practices Protection (Right to Farm) Act* from certain nuisance related lawsuits. BCFIRB's decisions are final but can be judicially reviewed or appealed to the Supreme Court of British Columbia.

A similar model in NSW would require new legislation and governance arrangements for the Board but could be scaled to suit the State's needs.

B. Ontario Normal Farm Practices Protection Board / Wollondilly Rural Industry Community Advisory Committee – Model B

A dispute resolution Board could be established with a guidance and advising role, composed of suitably qualified agricultural and land use planning experts or appropriate officials from within relevant government departments. They could provide a non-binding opinion on a particular dispute to assist the local authority. The Board would have no legislative power.

C. Queensland Land Access Ombudsman Model

The Queensland Land Access Ombudsman is an independent ombudsman with a dispute resolution mechanism designed to take pressure off the court system and government agencies. The Ombudsman was introduced under the *Land Access Ombudsman Act 2017* (Qld) as an “independent, impartial body to help landholders and resource companies resolve alleged breaches of conduct and compensation agreements and make good agreements.” Conduct and Compensation Agreements and Make Good Agreements are agreements between landholders and resource companies. The Ombudsman facilitates negotiations between parties, investigates and makes recommendations. Specifically, the Ombudsman has the power to hold meetings, conduct interviews, make inquiries with relevant technical experts and government entities, to require information and attendance, and to enter land the subject of a dispute. The Ombudsman’s recommendations are not binding.

The establishment of a new Ombudsman in NSW would require new legislation.

Option 3. Create a new or expanded agricultural disputes jurisdiction in a court or tribunal

The *Land and Environment Court Act 1979* divides the Land and Environment Court’s (LEC) jurisdiction into eight classes. Classes 1, 2 and 3 mostly involve merits review of administrative decisions as well as a jurisdiction to hear disputes (commonly between neighbours) regarding trees or hedges. The source of this jurisdiction is the *Trees (Disputes Between Neighbours) Act 2006*. Class 4 involves civil enforcement, usually by government authorities, of planning or environmental laws to remedy or restrain breaches and judicial review of administrative decisions and conduct under planning or environmental laws.

A dedicated class (or expanded class) dealing with agricultural operational disputes could operate in a similar vein to the successful trees jurisdiction whereby a Commissioner experienced in agricultural matters hears and adjudicates the matter only after the parties have attempted to mediate the dispute.

The process could be fast and inexpensive (when compared to traditional court proceedings) as parties are encouraged to avoid using lawyers, engage joint expert evidence and the matter is heard before a Commissioner experienced and comfortable with the subject matter. Relevant government departments such as DPI and the EPA could also provide information to the Court to assist in resolving the matter. The LEC is however still a court and will involve a level of stress and expense for parties involved. Such a change to the LEC’s jurisdiction would require statutory amendment.

The NSW Civil and Administrative Appeals Tribunal (NCAT) was established under the *Civil and Administrative Tribunal Act 2013* and provides a simple, quick, and effective process for resolving disputes and reviewing administrative action, including:

- services and processes to support self-representation by parties in most matters
- plain language forms and documents
- simplified processes
- a range of alternative dispute resolution methods.

NCAT can hear a broad range of cases including fencing disputes with neighbours through the Consumer and Commercial Division. These matters were previously heard by the various Local Land Boards before the passage of the *Civil and Administrative Tribunal Act 2013*.

A change to NCAT's jurisdiction would require statutory amendment.

Option to improve new development dispute resolution

The NSW Government could explore the following to improve development dispute resolution in agriculture.

Option 4. Expand the remit of the Independent Planning Commission

Conflict involving development applications can be seen as either an issue of planning processes (red-tape burdens) or the origins of ongoing land use conflict with agricultural operations. Although disputes about development application receive less attention than disputes about existing operations they are more significant in that they are the potential for growth in the industry. Intervention can be justified.

The Independent Planning Commission of NSW (IPC) has statutory power and is independent of all government departments. It has the following central functions:

- determine State significant development applications where there is significant opposition from the community
- conduct public hearings for development applications and other planning and development matters
- provide independent expert advice on any planning matter (but not development applications), when requested by the Minister for Planning and Public Spaces or Secretary of the Department of Planning, Industry and Environment

The IPC could hear complaints against agricultural development determinations. However, this would not be consistent with the IPC's strategic direction. The IPC has recently streamlined and limited the other matters it that considers, in line with the findings of the Productivity Commissioner's 2019 Review of the IPC.

Other options are being considered to improve the climate for investment in new developments, for example an expedited process through the LEC.

Chapter 3: Support the growth of agriculture and regional economies

Policy Problem: The planning framework does not reflect the needs of agriculture.

Improving consistency across Local Government Areas

Option 1. Clarification of agricultural land use definitions

The NSW Government could revise and update definitions in the Standard Instrument LEP to address ambiguity between LGAs.

Land use definitions are contained in the dictionary to the Standard Instrument LEP. The range of land uses that can be listed in the land use table of a Local Environmental Plan is limited to those included in the dictionary. The list of land uses in the Standard Instrument LEP does not cover all land uses which may be developed, nor do the definitions comprehensively describe all potential land uses or structures. Ambiguity in definitions leads to variations in how planning requirements are enforced across local government areas. This creates consistency and equity concerns for agricultural businesses across the State. Some agricultural definitions were updated and clarified with the introduction of the PPRD SEPP in 2019.

Examples of further definitions that could be clarified:

- **Artisan food and drink industry** – amend to include in the rural zone and facilitate on-farm diversification
- **Horticulture** – clarify as currently horticulture under Standard Instrument LEP can be applied to both fruit orchards and large greenhouse style developments, which are significantly different in terms of visual impact, traffic operations, etc
- **Farm building** – clarify that netting and frost fans are farm buildings and do not require a DA.
- **Intensive horticulture developments** – not currently mentioned in the PPRD SEPP and this is a production system that is expected to grow significantly. A definition and regime for the operation of these systems needs to be established.

Other definitions that could be addressed include barn-based dairies, plantation forestry and vertical insect farms which are not covered specifically in the current definitions. Land use definitions could also be reviewed to more accurately reflect the impacts of development. This would allow definitions to focus on outcomes and embed flexibility in the definitions to respond to changing practices.

While planning controls may vary across different LGAs to respond to local contexts, clarification and consistent application of land use terms helps to provide a level playing field for all agricultural producers. Certainty in land use terms prevents farmers who operate across different LGAs from unwittingly contravening local planning controls and being the subject of compliance action or complaints from neighbouring properties.

Option 2. Expansion of exempt and complying developments

The NSW Government could expand the list of exempt and complying developments in agriculture.

The NSW Government could consult on what developments ancillary to agricultural operations should be classified as exempt or complying.

Expanding the scope of exempt and complying developments can also be achieved at a local level through the education of planning practitioners on the modern agricultural practices and what should be considered acceptable on rural zoned land, and therefore not require a development application.

Developments that would be considered include, but are not limited to, orchard netting, frost fans, construction of cattle shelters, robotic dairies and feed pads.

The exemption and complying conditions applied in the NSW Government Special Activation Precincts could also be made available to other areas in the State where local authorities are trying to develop industry aggregations. This could include bespoke zoning.

Option 3. Buffer guidelines

The NSW Government could establish a guideline to clarify and consolidate buffer requirements across industry and LGAs.

Buffers are another mechanism identified by stakeholders which are not being applied and maintained consistently between LGAs. The 2020 Australian Farm Institute's report, 'Managing farm-related land use conflicts in NSW' highlights how buffers are utilised haphazardly across NSW. In some cases, buffer areas are implemented and then disregarded with residential development approved within a zone. DPI provides a set of recommendations for buffer areas between certain types of agricultural operations and conflicting land uses; however, these are not mandatory and not applicable for all farming operations and can be the cause of considerable conflict.

New developments can be built within the buffer when they are not considered in the development process. The landholder must then account for new buffers which can sterilise productive parts of the property and can lead to land use conflict. Progressive development in buffer areas erodes their purpose and the agriculture activity they are supposed to protect.

More rigour in the use and protection of buffers would have considerable long-term benefits.

Supporting industry growth through the planning framework

Option 4. Agent/initiator of change principle

The NSW Government could introduce the agent of change principle and reverse the onus of buffer requirements to new/encroaching developments.

The agent of change principle is an established planning principle applied in Victoria and internationally. It shifts the responsibility of mitigating nuisance to the introductory land use. In the case of agriculture, it would shift the onus onto new developments to account for buffer requirements of neighbouring agricultural operations.

Implementing the agent of change principle can be achieved through the education of planning practitioners, amendment of council development control plans or more formal amendment of statutory environmental planning instruments. It could also be achieved by requiring introductory land uses to apply mandated buffers to existing agricultural operations.

Option 5. Amend regulation on public submissions

The NSW Government could amend the planning regulation to better guide councils on how to consider submissions.

To support planning authorities in their consideration of submissions, and to ensure that the consideration is consistent with the aims of the EP&A Act and its focus on environmental impacts, the NSW Government could amend the planning regulation to better guide councils on how to consider submissions.

It is acknowledged that most councils and their planners would already have the expertise to appropriately consider such submissions but regulated guidance would support those councils in their decision making when faced with political pressure and broader public opposition based on issues unrelated to the immediate impact of the proposed development, such as objections to intensive agricultural developments on animal welfare grounds.

Areas for further research

The following areas have been identified through consultation for further research to inform future policy:

Theme	Scope
Urban Agriculture <i>The NSW Government could provide guidance materials on modern urban agricultural practices and its advantages.</i>	<p>Agriculture in higher density or an industrialised landscape will require a new way of doing things.</p> <p>Agricultural opportunities exist in insect farming in sheds on industrial lands, aquaponics, seaweed farming and controlled environment horticulture. To secure investment, guidance is needed on how the planning system could adapt or change to cater for these types of industries and their needs.</p>
Agricultural Offset and Credit Schemes <i>The NSW Government could investigate how an agricultural offset scheme could shore up supply of agricultural land and provide alternative income sources.</i>	<p>Schemes already exist in the planning framework for offsetting the loss native vegetation or adverse impacts on biodiversity. Similarly, the planning framework includes mechanisms to ensure that essential components of the urban environment such as public open space, community facilities and infrastructure are provided for the benefit of the entire community.</p> <p>There is an opportunity for the planning framework to support the safeguarding of agricultural land and the continuation of sustainable agricultural practices through a scheme of offsets or credits/contributions for agriculture.</p> <p>There are also mechanisms which support carbon capture through certain farming practices which have the potential to benefit some agricultural industries and provide alternative income streams for farmers.</p>
Minimum lot size <i>The NSW Government could conduct further research on the efficiency of lot sizes on agricultural operations and release guidance material.</i>	<p>Fragmentation of agricultural land is one of the primary factors affecting the continued use of rural land for productive agriculture. Fragmentation of rural land can lead to competition for the land from other land uses which prevents the future use of rural land for productive agricultural purposes. On the other hand, small lots are important to the rural lifestyle and should be encouraged in a planned and controlled way.</p> <p>The minimum lot size for rural land is often a reflection of historical policy and is not based on evidence. Achieving the minimum lot size does not guarantee that the land will continue to be used for agriculture as the size of the lot may be unsuitable for the particular farming method. Moreover, there is some evidence that minimum lot sizes can also be too large – too small to be viable businesses but too large for effective hands on management.</p> <p>Larger rural lot sizes continue to be necessary for some agricultural operations. This may be needed to achieve an economy of scale or to ensure sufficient buffers with surrounding land uses.</p> <p>During consultation an example was given by Port Macquarie-Hastings Council about a development application for a cattle feedlot on a 43-hectare rural property. The development application was attempted twice but withdrawn both times following strong objection from surrounding residents. This example shows that the size of the property can be important in determining what type of agriculture is suited to that site.</p> <p>This work could help inform future subdivision of rural land retains lot sizes which can support economically viable farming operations, and the growth of regional cities and towns through attracting new residents.</p>

Appendix 1: Evidence base

Date	Report
2016	Regulation of Australian Agriculture, Productivity Commission Inquiry Report
2018	Right to Farm Agricultural Land Use Survey, Final Report, University of Technology Sydney
2018	Fresh Food Pricing Report, Portfolio Committee No. 1 – Premier and Finance
2019	Best Practice Land Use Planning, AgriFutures Australia
2019	Land Use in Rural Zones: Tweed and Cabonne Shires, Final Report, Askland et al.
2019	Rural and Regional Planning (NSW), Planning Institute of Australia
2020	Land Use Conflict in NSW, Australian Farm Institute

Appendix 2: Summary of options

Chapter 1: Minimise the loss of productive capacity		
POLICY PROBLEM: THE NSW GOVERNMENT HAS NO POLICY ON THE DEFINITION OF STATE SIGNIFICANT AGRICULTURAL LAND AND HOW IT SHOULD BE DEVELOPED.		
Non-statutory mechanisms	Rural Land Use Planning Policy	The NSW Government should develop a policy on rural land.
	Option 1. Identified Production Areas	The NSW Government could identify production areas across the State.
	Option 2. Monitoring and Reporting of Loss of Rural Land	The NSW Government could monitor land use change and the loss of rural land that is best suited to agriculture.
	Option 3. Education	The NSW Government could support local government councils and planners understand the needs of agricultural operations.
Statutory Mechanisms	Option 4. Identification of State Significant Agricultural Land.	
	Option 4a. State Agricultural Land Use Planning Policy	The NSW Government could implement a policy on rural land through guidance material, plus various changes in the planning framework, including filling the schedule in the PPRD SEPP.
	Option 4b. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Criteria	The NSW Government could implement a policy on agricultural land through guidance material, plus various changes in the planning framework, including a list of criteria that defines State Significant Agricultural Land in Schedule 1 in the PPRD SEPP.
	Option 4c. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Map	The NSW Government could implement a policy on agricultural land through guidance material, plus various amendments in the planning framework, including considerations and a map of State Significant Agricultural Land in Schedule 1 in the PPRD SEPP.
	Option 4d. State Agricultural Land Use Planning Policy and State Significant Agricultural Land Map - councils opt in	The NSW Government could release a guiding policy on agricultural land and a map of SSAL which is optional for councils to adopt.
	Option 5. Controlling Land Use in Rural Zones	The NSW Government could prohibit zone changes or non-agricultural uses on agricultural land except in certain tightly defined circumstances or through a stringent exceptions process.
	Option 6a. DPI approval of developments on SSAL and IPAs	The NSW Government could require councils to get agreement from DPI before deciding on the development of non-agricultural uses on SSAL and in IPAs.
	Option 6b: DPI advice in relation to development on SSAL and IPAs	The NSW Government could require councils to seek formal advice from DPI for the development of non-agricultural uses on SSAL and in IPAs.

Chapter 2: Reduce and manage land use conflict

POLICY PROBLEM: THERE IS NO SIMPLE, ACCESSIBLE AND IMPARTIAL MECHANISM FOR FARMERS TO RESOLVE LAND USE CONFLICT REGARDING THEIR OPERATIONS

Options to improve operational dispute resolution

Option 1. Expand the jurisdiction of existing dispute resolution bodies

Option 2. Create a new dispute resolution body

Option 2a. Ontario Normal Farm Practices Protection Board / British Columbia Farm Industry Review Board - Model A

Option 2b. Ontario Normal Farm Practices Protection Board / Wollondilly Rural Industry Community Advisory Committee – Model B

Option 2c. Queensland Land Access Ombudsman Model

Option 3. Create a new or expanded agricultural disputes jurisdiction in a court or tribunal

Options to improve development dispute resolution

Option 4. Expand the remit of the Independent Planning Commission

Chapter 3: Support agriculture to recover and grow

POLICY PROBLEM: THE PLANNING FRAMEWORK DOES NOT REFLECT THE NEEDS OF AGRICULTURE

Improving consistency across LGAs	Option 1. Clarification of agricultural land use definitions	The NSW Government could revise and update definitions in the Standard Instrument LEP to address ambiguity between LGAs.
	Option 2. Expansion of exempt and complying developments	The NSW Government could expand the list of exempt and complying developments in the Standard Instrument LEP.
	Option 3. Buffer guidelines	The NSW Government could establish a guideline to clarify and consolidate buffer requirements across industry and LGAs.
Supporting industry growth through the planning framework	Option 4. Agent of change/ initiatory of change principle	The NSW Government could introduce the agent of change principle and reverse the onus of buffer requirements to new/encroaching developments.
	Option 5. Amend regulation on public submissions	The NSW Government could amend the planning regulation to better guide councils on how to consider submissions.