THE LAW SOCIETY
OF NEW SOUTH WALES

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25 February 2021

Mr Daryl Quinlivan
NSW Agricultural Commissioner
Department of Primary Industries
Locked Bag 21, Orange. NSW 2800

By email: agcommissioner@dpi.nsw.gov.au

Dear Mr Quinlivan,

Options Paper: Agricultural Land Use Planning Strategy

Thank you for the opportunity to contribute to the Department of Primary Industries Options Paper: Agricultural Land Use Planning Strategy.

The Law Society has prepared the following comments with input from the Environmental, Planning and Development and the Rural Issues Committees.

Chapter 1: Minimise the loss of productive capacity

Options-General

The options paper notes:

> 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.[1]

Option 4 proposes that the implementation of a State Agricultural Land Use Planning Policy could require planning proposals for non-agricultural land use on rural land. Given that no specific zone is used for agriculture, and rural zones accommodate a broader range of development types, the requirement for planning proposals for non-agricultural land use on rural land would require either considerable rezoning or detailed criteria for assessing whether land is 'rural land', such as to require a planning proposal for non-agricultural development.

[1] Department of Primary Industries (NSW), Option Paper 'Agricultural Land Use Planning Strategy, 5.

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The requirement for a planning proposal for any non-agricultural land use on 'rural land' would likely create significant uncertainty for landowners seeking to develop their land and a piecemeal approach to strategic planning, particularly in relation to non-agricultural land uses that are complementary to agriculture in rural areas, including centres for retail, industry, and infrastructure as well as residential centres and accommodation for farm workers.

Similarly, the suggestion that the *State Environmental Planning Policy (Primary Production and Rural Development) 2019* and/or the *Standard Instrument- Principal Local Environmental Plan* (Standard Instrument LEP) may be amended to require consideration of "suitable alternative locations"[2] would create uncertainty for landowners as to the development potential of their land and would deliver strategic planning outcomes in an ad hoc and potentially inconsistent way.

The requirement for a consent authority to consider whether potential impacts on agriculture from proposed non-agricultural development is sufficiently provided for by cl 5.16 of the Standard Instrument LEP, which currently requires the consent authority to take into consideration "any measures proposed by the applicant to avoid or minimise any incompatibility" between existing and proposed land uses. Requiring this test to be more stringent, i.e., ensuring that the impacts have been minimised,[3] neglects the interplay between this consideration and the balance of matters to which the consent authority is required to give consideration.

Preferred option

The Law Society supports a statutory mechanism to strengthen the proposed Rural Land Use Planning Policy. The preferred statutory mechanism is Option 4b - State Agricultural Land Use Planning Policy and State Significant Agricultural Land (SSAL) Map, creating consistency of policy application across local government areas. We consider the approach in option 4b preferable to the approach in option 4a as it allows for reconciliation of SSAL across local government boundaries.

State-developed mapping of SSAL would promote consistent application of control provisions applied to land. In our view, ad hoc agricultural land mapping has the potential to allow councils to favour non-agricultural land use interests, creating uncertainty in approach to the protection of agricultural land. We note the non-statutory mechanism of providing education to local government planners at Option 3. It is our view that State-developed mapping has the dual benefit of providing consistency of approach and educating local government planners. The direction provided by a State-developed map will assist to advise councils when making planning decisions through the expert input from the Department of Primary Industries.

The location of SSAL may be impacted and changed overtime by factors including the effects of climate change, drought, salinity and the prevalence of pests and invasive species and natural disasters. Adoption of this option should be accompanied by appropriate resourcing to allow councils to carry our mapping both initially and to review mapping as appropriate.

We do not consider it appropriate for proponents of development to be required to verify that their land is not SSAL if pursuing non-agricultural development in the absence of a map, as this would require considerable, and potentially prohibitive, amounts of reporting to accompany development applications. The assessment of this information would similarly

[2] Ibid 9.
[3] Ibid 9.

require considerable allocation of council resources, slowing the development assessment process. This is particularly true in rural local government areas which are likely to have considerable amounts of SSAL and fewer assessment resources.

A draft State Environmental Planning Policy (SEPP) (and any proposed amendments to the Ministerial directions/standard instrument provisions) should be exhibited for comment before finalisation, as the construction of these instruments may have a significant effect on whether the reforms achieve the objectives pursued, and whether they are likely to have any significant unintended effects. A draft SEPP would also need to demonstrate how inconsistencies with other SEPPs would be resolved where inconsistencies arise between various State priorities, including the *State Environmental Planning Policy (Infrastructure) 2007* and *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.

Other factors

The options paper does not consider issues including forestry, private native forestry, mining, energy, biodiversity, drought, or water. There are considerable disadvantages to this approach, as these matters are often intrinsically linked to the use of rural land in NSW. Any of the options pursued seeking to minimise the loss of productive capacity should consider these matters to the extent that they are competing and often conflicting to agricultural land use.

It is important that the broader aims of the SEPP or any other statutory instrument to encourage agriculture are not given blanket priority over the aims of environmental protection, including where areas of identified agricultural land are areas currently zoned for environmental protection. The broader aims of the SEPP, or any other statutory instrument, should seek to strike an appropriate balance between continued agriculture and environmental protection.

Chapter 2: Reduce and manage land use conflict

We agree that alternative dispute resolution of land use conflicts should be the first approach. While generally this may best be achieved by expanding the jurisdiction of existing bodies, further information is required as to the nature of such disputes to comment on which bodies may be appropriate to carry out this function.

Similarly, further information is required as to the nature of the disputes envisaged to be dealt with by expanding the jurisdiction of the Land and Environment Court (LEC) or NSW Civil and Administrative Appeals Tribunal. It is also unclear whether the Court/Tribunal would have this jurisdiction vested in it by a new Act, or by amendment of the *Land and Environment Court Act 1979* or *Civil and Administrative Tribunal Act 2013* to capture certain existing claims.

If it is proposed that the LEC may deal with land use conflicts, as it does with disputes under the *Trees (Disputes Between Neighbours) Act 2006*, then we consider that this path is fraught with difficulty, as the tree dispute legislation prevents claims in nuisance. To do the same for a wide variety of potential land use conflicts, some of which may be on a large scale, is not appropriate because it will remove remedies for legitimate claimants.

Chapter 3: Support the growth of agricultural and regional economies

In relation to proposed Option 2 in this chapter, the options paper states:

> 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.[4]

This misstates the purpose of exempt and complying development in NSW. Development is declared to be exempt development by an environmental planning instrument because of its minor impact.[5] It cannot be exempt development merely by reason of the fact that it is ubiquitous in modern practice. Similarly, complying development is development that can be addressed by specified predetermined development standards.[6] Any expansion of the categories of exempt and complying development need to be considered against these definitions.

The recommendation in Option 5 to amend the planning regulation in relation to how councils should consider submissions on development applications should not be adopted. It would be inconsistent with the aims of the Act, particularly the community participation specified in objective 1.3(j) of the *Environmental Planning and Assessment Act 1979* (EP & A Act), to limit the way submissions can be taken into consideration for the purposes of section 4.15 of the EP & A Act when assessing development applications.

The Law Society is supportive of Option 1 - Clarification of agricultural land use definitions. Revising and updating definitions in the Standard Instrument LEP will reflect the changes in technology used in modern agricultural practices and the growth anticipated in the industry. Updating definitions is an easily implemented strategy, assisting to standardise the enforcement of planning requirements across local government areas.

Should you have any questions or require further information about this submission, please contact Stephanie Lee, Policy Lawyer, on (02) 9926 0272 or email stephanie.lee@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

[4] Ibid 19.
[5] S 1.6(2) *Environmental Planning and Assessment Act 1979*.
[6] S 4.2(5) *Environmental Planning and Assessment Act 1979*.