

**Submission
No 15**

**INQUIRY INTO LANDOWNER PROTECTION FROM
UNAUTHORISED FILMING OR SURVEILLANCE**

Organisation: NSW Farmers

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Submission



Inquiry into landowner protection from unauthorised filming or surveillance

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Table of contents

Table of contents	2
About NSW Farmers.....	3
Executive summary	4
Recommendations	6
Legal Protections for Landowners	7
<i>Surveillance Devices Act 2007</i>	7
<i>Protections from Trespass</i>	9
<i>On-Farm Technology for Protection</i>	10
<i>Unmanned Aerial Vehicles (Drones)</i>	10
Penalties.....	14
<i>Extent and Appropriateness of Current Penalties</i>	14
<i>Simplify the Process of Reporting</i>	16
Self-Incrimination.....	18
<i>Obligation for the use of surveillance equipment by farmers as employers</i>	18
<i>Unintended consequences of prescriptive requirements</i>	19
Changing Media Environment	20

About NSW Farmers

A profitable and sustainable New South Wales farming sector

The NSW Farmers' Association is Australia's largest state farming organisation representing the interests of its farmer members.

Farmers across New South Wales produce more than \$15 billion worth of food and fibre every year, representing around one quarter of Australia's total agricultural output. Our state's unique geography means a wide variety of crops and livestock can be cultivated and nurtured. NSW Farmers is Australia's only state-based farming organisation that represents the interests of farmers of all agricultural commodities – from avocados and tomatoes, apples, bananas and berries, through grains, pulses and lentils to oysters, cattle, dairy, goats, sheep, pigs, and chickens.

Our focus is not just on issues affecting particular crops or animals – it extends to the environment, biosecurity, water, economics, trade, and rural and regional affairs. We also have an eye on the future of agriculture; we are advocates for innovation in agriculture, striving to give our members access to the latest and greatest innovations in research, development, and extension opportunities. Our industrial relations section provides highly specialised advice on labour and workplace matters.

Our regional branch network ensures local voices guide and shape our positions on issues which affect real people in real communities. Members are the final arbiters of the policies of the Association – through our Annual Conference and elected forums such as Executive Council, members can lobby for the issues which matter to them and their community to become Association policy. Our issue- and commodity-specific Advisory Committees are elected by members to provide specialist, practical advice to decision makers on issues affecting the sector. We are proudly apolitical – we put our members' needs first.

In addition, NSW Farmers has partnerships and alliances with like-minded organisations, universities, government agencies, and commercial businesses across Australia. We are a proud founding member of the National Farmers' Federation.

Executive summary

The NSW Farmers Association welcomes the inquiry into landowner protections from unauthorised filming and surveillance.

The impact of trespass that results in theft or damage to operating plant, or inappropriate activities by animal activists has a significant and lasting impact on farmers - as individuals and as a community.

Agriculture is a significant and long-standing contributor to the economic prosperity of NSW. By the very nature of primary production farmers have responsibility for land care and stock management to achieve the best possible outcome. At the heart of their operations is the opportunity to meet consumer expectations of the highest quality product. There is no way this will be achieved without the strongest commitment to the ongoing care and highest standards of animal welfare, in which Australia is a world leader.

It is disturbing therefore from both a community and a food and fibre production perspective, that those opposed to the rearing of livestock believe they have a right to unfettered access to and therefore public critique of farm production. The unauthorised and covert surveillance and filming of these lawful businesses is a crime, and there is no public good served by these violations.

Both at a state and national level Australia has enacted legislation that enshrines protections, and sets enforceable standards for privacy, freedom of speech and animal welfare. Illegal surveillance breaches many of these.

Due to trespass, be it physical or technological, farmers lose productive time, incur operational setbacks and associated costs, and have to manage the emotional and psychological impacts – both short and long-term.

Filming equipment and surveillance systems, including unmanned drones are an example of a broader, innovative development in new surveillance technologies and their use. This development is challenging the boundaries and efficacy of existing legal frameworks and raising a range of social and ethical concerns.¹

While the agricultural sector values these technologies as productivity enhancements, this same technology is increasingly used to progress negative agendas and campaigns with impunity by animal activists, and provide intelligence to undertake trespass and farm theft. In a recent NSW

¹ Gogarty, B and Hagger, M, 'The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air', *Journal of Law, Information and Science* 73, 19(1), 2011.

Landowner protection from unauthorised filming or surveillance

Farmers' Association survey of members, of those that were aware of illegal surveillance on their properties, 30% reported this as by drones and 21% by light aircraft.

NSW Farmers' considers that the following principles must be addressed by the Inquiry:

- ensuring that the legal frameworks – at both a State and Commonwealth levels – are fit for purpose and have the capacity to retain currency in an evolving technologically driven environment;
- that the rights and responsibilities of both those under surveillance and those initiating the surveillance have equal rights to protection and prosecution (where indicated); and
- that primary producers are well informed of their rights and responsibilities and adequately supported with regard to responding to trespass and associated illegal surveillance.

Recommendations

Legal Protections for Landowners

1. *That there be a focus by the NSW Government to improve the capacity to collect evidence to increase successful enforcement outcomes regarding surveillance, with a particular focus on the rapidly changing technology used to acquire and disseminate information.*
2. *That the NSW Government establish a cross-agency working group to review existing regulation and legislation on illegal farm incursions, and identify current barriers to successful prosecutions and enforcement.*
3. *That the NSW Government work with CASA on the drafting of Commonwealth or State legislation or regulation regarding the appropriate use of Unmanned Aerial Vehicles, including incorporating the impact on animal welfare.*

Penalties

4. *That along with legislative and regulatory considerations the NSW Government makes significant commitment to improving food and fibre education in both schools and the broader community to strengthen understanding of the activity of farming and the value of food safety and security.*
5. *That NSW work with the Australian Government to refer appropriate investigative authority under law to support timely on-ground investigations of illegal surveillance – both on ground and in air space.*

Self-Incrimination

6. *That sellers of equipment (online or shop-front retailers) that can be used for surveillance be required to provide written advice included in the packaging of the privacy obligations that apply under NSW law.*
7. *That in consideration of legislative responses to minimise inaccurate and unproven promotion of poor animal welfare practices, due process be included the right of farmers to undertaken their business without compulsion to address unfounded claims.*

Media

8. *That the NSW Government explores stronger penalties and avenues of recourse for landowners to prevent the broadcast of illegally obtained content.*

Legal Protections for Landowners

Farmers are not currently provided sufficient protection from unauthorised filming or surveillance. Farmers have been victims of unauthorised filming from animal activists, who have unlawfully entered farms, and visitors that have covertly filmed practices on the farm. These incursions have a serious impact on farmers with misleading footage placed on websites and distributed by the media, resulting in serious emotional distress and potentially reputational damage. Unauthorised filming and surveillance has also been used to the detriment of farmers, with criminals using technology to understand the items of value and assist in planning a farm raid.

The current legislative framework has been ineffective in providing farmers with protection from these activities. This has resulted in farmers losing faith in the legal system and investing in technology to provide themselves with protections. The legislative framework must be strengthened to provide farmers with greater protection, but these reforms must not hinder a farmer's ability to utilise technology to protect their property.

Surveillance Devices Act 2007

The *Surveillance Devices Act 2007* (NSW) ('the Act') is the key piece of legislation in New South Wales that regulates the installation, use, maintenance and retrieval of surveillance devices in NSW. A technology neutral definition is encompassed within the legislation and this facilitates it being able to respond to technology advancements. The definition of 'surveillance device' means a data surveillance device, a listening device, an optical surveillance device, or a tracking device.

The Act makes it an offence for a person to use surveillance devices without the consent of the landowner and also a criminal offence to distribute or publish information that has been obtained through the use of unlawful surveillance devices. Section 8 of the Act prohibits the installation, use or maintenance of an optical surveillance device:

"...on or within premises or a vehicles or on any other object...if the installation, use or maintenance of the device involves: (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle; or (b) interference with the vehicle of other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle of object."

This prohibition is broader than the Victorian *Surveillance Devices Act 1999* (VIC), in that it covers the recording of all activities (not just private activities).

However, the requirement for entry onto premises, or a vehicle, without consent narrows the application. For example, it does not prohibit the use of a surveillance technology such as a drone, to observe private activities taking place on a neighbour's property if the surveillance technology remains in its owner's possession.

Limitations

The Act is yet to be tested by the judicial system, and this makes determining the effectiveness of the protections afforded to farmers difficult. There was a recent case that was unfortunately dismissed on a legal technicality- a document had not been properly executed. Although the case was dismissed, it did highlight a number of issues with the legislative protections afforded under the Act.

- Prosecution and enforcement

A key issue with the level of protection afforded to landowners by the Act is the effectiveness in prosecutions being achieved. A major issue with the effective enforcement of the Act is being able to obtain sufficient evidence for a case to be successfully taken to court. It is extremely difficult for enforcement agencies to gather sufficient evidence to fulfil the requirements of the unlawful surveillance device provisions, primarily because these activities are undertaken covertly. The secretive nature makes it difficult to determine the persons whom have undertaken the unlawful conduct and this information is fundamental to gaining a conviction.

The difficulty in obtaining a successful conviction is further hindered by the intangible nature of the technology used in the surveillance. Information, such as metadata, that would facilitate identifying the persons responsible for undertaking the unauthorised surveillance or filming can be removed.

- Distribution of unauthorised content

The footage obtained during the illegal surveillance is often distributed by the perpetrators through websites and media channels. It is important to highlight that this can be perpetrated both by those unlawfully entering properties and those that have been given permission to enter but not to undertake filming. The Act covers both these acts of unauthorised surveillance but the legislative framework is silent on giving victims means to limit or remove the broadcasting of the content. There is a need for mechanisms to limit the distribution and compel perpetrators to have the content removed from the public domain.

- Beyond physical proximity

As the technological frontier expands, filming and surveillance devices are moving beyond the physical limits. The legislative framework must keep pace with and reflect the developing technology equipment which increasingly requires no physical proximity to a landowner or the landowner's property to create a video recording and/or visual recording. Devices now operate through complex systems such as on a semi-autonomous basis, and via remote-control by the user who can observe private activities from great geographical distances.

RECOMMENDATION:

That there be a focus by the NSW Government to improve the capacity to collect evidence to increase successful enforcement outcomes regarding surveillance, with a particular focus on the rapidly changing technology used to acquire and disseminate information.

Protections from Trespass

Farm trespass by animal activists is well known and has a significant and negative impact on the production of food and fibre. The ultimate object of this activity is to disrupt legitimate farming activity. The deliberate antagonism and belligerent opposition to farming expressed through trespass by animal activists makes this a standout issue that requires significant attention.

Often this trespass results in covert surveillance and collection of unattributed footage and images to be used as tools in an ideological campaign of public defamation. The action of illegal recordings as part of these illegal farm incursions has allowed for the Act to be a mechanism to provide farmers with legal protections. However it is vital to recognise that the illegal surveillance is not the primary issue with these incursions that needs to be addressed.

The primary crime is the illegal act of trespass, with farmers' property rights being violated, and the current legislative framework is not effective in protecting farmers from these activities. There are a range of offences both within the *Inclosed Lands Protection Act 1901* (NSW), *Crimes Act 1900* (NSW) and the *Biosecurity Act 2015* (NSW) which should be the primary mechanisms for dealing with perpetrators of illegal farm incursions. Currently these various laws are not being enforced and hence they are not effective in providing protections to farmers.

RECOMMENDATION:

That the Government establish a cross-agency working group to review existing regulation and legislation on illegal farm incursions, and identify current barriers to successful prosecutions and enforcement.

On-Farm Technology for Protection

Farmers have actively invested in technology to provide themselves with protections from unlawful surveillance and filming activities. In response to the NSW Farmers' member survey, 72% reported recent trespass, of which 15% indicated this involved actions by animal activists. Of those respondents who reported installing surveillance devices to reduce the trespass, 64% had installed still cameras, 45% installed video cameras, and 23% had installed motion sensor lighting. It will be critical that any change to the legislative framework considers this legitimate use and ensures that it is not hindered.

A key area of investigation by farmers has been in tracking device technology, and to date this has been focused on applications around biosecurity management, to aid farmers understanding of the parties that are entering their property. This technology may have application to minimising farm incursions and it would be encompassed by the Act as a 'tracking device', as it is an electronic device capable of monitoring the geographical location of a person.

Generally, it is an offence to knowingly install, use or maintain a tracking device to determine the geographical location of a person without their permission. The only exceptions that apply relate to using a tracking device 'for a lawful purpose'. There is no case law or commentary about what the court considers a 'lawful purpose' to be. In the absence of any direct guidance, the meaning of a 'lawful purpose' could be taken to be similar to the meaning of a 'lawful interests' (as used in relation to an exception where a listening device may be used) – i.e. a purpose that is not unlawful, similar to a legitimate purpose or a purpose conforming to law.

Unmanned Aerial Vehicles (Drones)

The 2014 Standing Committee on Social Policy and Legal Affairs' *Eyes in the Sky: Inquiry into Drones and the Regulation of Air Safety and Privacy* Inquiry Report determined the surveillance regulatory landscape in Australia is piecemeal and ill-equipped to deal with emerging surveillance technologies.² Federal privacy legislation generally only covers Federal agencies and large private sector organisations, and surveillance devices laws vary by states and territories.

Lack of Protection under Current Regulations

Civil Aviation Safety Authority (CASA) has national responsibility to regulate Unmanned Aerial Vehicles (UAVs). UAVs are generally referred to as "drones" and most are piloted by remote control

² House of Representatives Standing Committee on Social Policy and Legal Affairs, *Eyes in the Sky: Inquiry into Drones and the Regulation of Air Safety and Privacy*, Parliament of Australia, July 2014.

and often mounted with cameras. When it comes to drone regulations, CASA only provides safety protocols and rules surrounding trespass and privacy incidents are unclear.

The *Civil Aviation Safety Regulations 1998* (Cth) do not specifically address the use of camera, audio recording, or other surveillance equipment on UAVs. The *Privacy Act 1988* (Cth) is a federal law that “regulates the handling of personal information about individuals.” It only applies to Commonwealth agencies and organisations with an annual turnover of \$3 million. Private UAV pilots and small companies, such as technology start-ups, would generally not be subject to the *Privacy Act*.

Further, there are no specific regulations which protect the privacy of individuals regarding the use of UAVs. CASA has indicated that the privacy issues associated with UAVs are beyond its remit. John McCormick, former Director of Civil Aviation Safety Authority (CASA) confirmed in 2013, “Dealing with matters related to privacy is not part of CASA’s role, it is a matter for the Australian Privacy Commissioner.”³

In a letter addressed to the Attorney-General dated September 2012, former Australian Privacy Commissioner Timothy Pilgrim pointed out that in relation to drone technology the *Privacy Act* does not cover the actions of individuals in their private capacity, including any use of drones by individuals.⁴

Special Counsel Matthew Craven of law firm Corrs Chambers Westgarth has written extensively on drone privacy issues. In a CHOICE article he is quoted saying that, “I am not aware of any cases in Australia where a private individual has successfully taken action against a drone pilot for breaching their privacy, whether under the *Privacy Act* or under any other law.”⁵ Additionally Mr Craven states that “Unless the drone pilot is working for an organisation with at least \$3 million in annual revenue it is not possible for a private individual to take action against an individual drone pilot under the *Privacy Act* as it currently stands.”⁶

In 2014, the *Eyes in the Sky: Inquiry into Drones and the Regulation of Air Safety and Privacy* Report recommended that CASA and the Australian Privacy Commissioner review the adequacy of the privacy and air safety regimes in relation to remotely piloted aircraft (RPA) operations. To date, no changes to the relevant laws have been made.

³ *The Use of Drones in Australia: An Agenda for Reform* (May 2015), prepared jointly by Australian Association for Unmanned Systems and Liberty Victoria, Ch6: Appendix, 24.

⁴ *The Use of Drones in Australia: An Agenda for Reform* (May 2015), prepared jointly by Australian Association for Unmanned Systems and Liberty Victoria, Ch6: Appendix, 24.

⁵ Andy Kollmorgen (18 May 2018), ‘Drone and Australian Law’ CHOICE. URL retrieved 27 June 2018.

<<https://www.choice.com.au/electronics-and-technology/gadgets/tech-gadgets/articles/drones-and-privacy-rights>>.

⁶ Ibid, <<https://www.choice.com.au/electronics-and-technology/gadgets/tech-gadgets/articles/drones-and-privacy-rights>>.

It will be important that any new regulations ensure that citizens are appropriately protected and 'red tape' is minimised to encourage growth and investment in this emerging, and in the main beneficial, technology.

Status of protections for farmers

Under current legislation oral recordings of conversations cannot be made without consent, however the very nature of visual recordings means that private acts may be captured as 'background' and therefore can be published with impunity under the law. Consequently it could be argued that there are lower protections for farming enterprises than are expected for personal privacy. For example, there are not the same protections regarding the filming of agricultural practices from beyond the farm fence as there is for filming outside the school gate.

It is an offense to record using a drone above a household if this act impedes the enjoyment of others and many of the drone software applications restrict the use in built up areas, yet there is no differentiation in rural landscapes between open public parkland and private farming enterprises. NSW Farmers' Association considers that the protections within the law should require that no drones should be allowed to fly over any private property without prior consent from the owner.

Stock disturbance and welfare

If a farm is a livestock operation, those who are illegally trespassing will likely be unfamiliar with the livestock, and will often enter at unusual hours. Stock disturbance is often caused by physical presence on the property, but can also occur through the operation of drones.

Significant disturbance to livestock may have serious consequences, including death or injury. For example, disturbance of ewes that are due for lambing can cause them to be startled, disrupting a normal lead up to birth, and endangering the lives of both the ewe and the lamb. Trespass by activists untrained in animal husbandry also creates risk of injury or death as they seek to either 'rescue' or film animals.

CASA guidelines do not cover animal welfare issues resulting from surveillance devices. Our Farmers' members have recounted stories of narrowly escaping serious injury to their cattle and themselves when drones have flown above paddocks and hovered over a herd of cattle. Due to the noise, the cattle become distressed, running away from the drone they head towards hazards such as electric wire fences and in some cases, towards the farmer if they are among the cattle at the time. This situation can cause serious injury and can lead to fatalities for both the livestock and farmer.

RECOMMENDATION:

That the NSW Government work with CASA on the drafting of Commonwealth or State legislation or regulation regarding the appropriate use of Unmanned Aerial Vehicles, including incorporating the impact on animal welfare.

Penalties

Penalties for unauthorised filming and surveillance need to appropriately balance the beneficial uses of surveillance technologies against protecting the privacy and safety of the community.

Filming and surveillance devices allow for pervasive surveillance in a way not contemplated by current legislation. The extent and appropriateness of the penalties incorporating civil aviation safety laws and privacy and surveillance laws in NSW and federally, do not reflect the protection of landowner's privacy and security.

By implementing clearer penalties on where, when and how filming and surveillance can be used, community confidence and reporting of the misuse of this technology to the relevant authorities will increase. It will provide individuals an avenue for meaningful redress when faced with the misuse of filming and surveillance.

Extent and Appropriateness of Current Penalties

A recent survey of NSW Farmers revealed that 89% of respondents consider that current laws disadvantaged farmers in deterring illegal surveillance. This is based on their concern that current laws have not kept pace with new technology (59%), it is too hard to gather evidence (21%), and that the burden of proof is too high (21%).

Similarly 89% of respondents considered that the current penalties for illegal surveillance are not effective as evidenced by the following comments:

"Unauthorised filming of a property/ livestock should not be allowed to be sold / given to media and used without consent. The media should be fined if they use such material as it can be totally twisted to a misinformed public and be extremely detrimental to a business."

"Allow property owners the right to confiscate or prevent the use or operation of surveillance equipment without the fear of being penalized protecting their own property."

"People should not be allowed to walk on your farm and or film without permission...Not sure on current penalties but it needs to be a big enough sentence to discourage any form of illegal surveillance or trespass."

"Anybody using film footage from farms to push a cause where they are not the owners or managers of the farms in question should have to provide evidence of how they obtained the footage. If this has been done without permission then the footage should be confiscated and if it is used then the users should be subject to heavy fines."

"Penalties need to reflect the real financial impact and pervious financial impact of any illegal activity."

What is evident in these responses is that public perception of penalties is at a low level and potentially not at a level that would deter those undertaking illegal surveillance. It is also becoming increasingly obvious that the high level of motivation by those undertaking illegal surveillance on farms is not impacted by any potential penalties.

To achieve change, non-legal or regulatory responses are an important option. There is a significant body of research that indicates that there is a substantial disconnect between the food and fibre producer and the consumer. In 2012 Primary Industries Education Foundation Australia (PIEFA) and the Australian Council of Educational Research (ACER) undertook a national survey of students which found that 75% thought cotton socks were an animal product; 27% though yoghurt was a vegetable product; 45% did not identify bread, bananas or cheese as being farmed products; and 40% believed farming damaged the environment;

Additionally a 2017 National Farmers Federation (NFF) consumer survey found that 83% of those surveyed described their connection with farming as distant or non-existent; and that 57% had no contact with a farmer in the last year.

RECOMMENDATION:

That along with legislative and regulatory considerations, the NSW Government makes significant commitment to improving food and fibre education in both schools and the broader community to strengthen understanding of the activity of farming and the value of food safety and security.

Impact of Illegal Surveillance

The isolated nature of many rural properties makes the act of rural crime terrifying for farming families. Rural crime impacts financially on farm business operations, undermines the confidence and safety of farming families in their own homes, and can lead to division and agitation across rural communities.

- Family and security

Farm trespass, whether for poaching, activism, hunting or any other criminal activity, is akin to break and enter in urban communities. It is an invasion of privacy and erodes what should be a natural sense of security in the home. Be it a farm business or a family home, the experience of having unwelcomed and unwanted persons on a property undermines the feeling of safety for a landholder and their family. This experience is heightened by isolation, given the fear that those trespassing may be armed, accompanied by dogs, seeking to take covert footage, or install hidden cameras for ongoing observations. The relative isolation of many rural properties acts to exacerbate the challenges faced by any victim of crime to prevent or respond to any illegal activity on a property.

The *Inclosed Lands Protection Act* was recently amended to recognise these factors with a rural trespass offence being created. This new offence increased the penalties courts could impose on perpetrators and it is vital that this new offence is utilised.

- Biosecurity

Illegal farm incursions are a major risk to the biosecurity protocols of farms. Many farms, particularly intensive farming operations including piggeries, and poultry meat and egg farms, follow strict biosecurity protocols aimed at ensuring positive health and welfare outcome for animals by preventing the spread of disease. Similarly, the accreditation of many livestock operations as having minimal diseases is critical to accessing premium markets, and the same is true of horticultural operations when managing diseases and pests, such as fruit fly.

Persons that illegally enter farms, whether for hunting, illegal activism or any other criminal activity, may have visited multiple farms in a short period of time. These actions create significant potential for the spread of disease. There are legislative mechanisms, both within the *Biosecurity Act* and the *Inclosed Lands Protection Act*, that enable enhanced penalties to be applied which recognised this increased biosecurity risk. There is yet to be an instance of these enhanced penalties being utilised but it is vital that enforcement agencies use them, to ensure that the penalties for these crimes reflect the seriousness.

Simplify the Process of Reporting

It is apparent that many landholders are unaware that the NSW Police Force has no authority when reporting sightings of unauthorised surveillance equipment. The Civil Aviation Regulation 1998 and Civil Aviation Safety Regulation 1998 (CASR) provide for the operation of Remotely Piloted Aircraft Systems (RPAS) and relevant offences for their misuse. Offences under CASR are summary Commonwealth offences and administrative offences punishable by fine, via infringement notice or court action.

The NSW Police Force is not authorised to commence proceedings against any person found to be committing offences for the misuse of RPAS. Currently, the only entity with authority to commence action for offences committed by RPAS is CASA. The NSW Police Force is restricted under law to encourage the community to report unsafe operations, incidents, accidents or other suspected violations to CASA. It is only if a primary producer landholder chooses to make a report to NSW Police, that the police then notify CASA. CASA may then call upon NSW Police to assist them by collecting evidence and conducting interviews.

This current process is causing a twofold issue for landholders and NSW Police Force:

1. The current process is untimely and dependent on CASA requesting that the NSW Police provide assistance. This process clearly disadvantages the landholder and decreases the possibility of a successful prosecution.
2. There is a lack of community understanding of the extent of the NSW Police authority to initiate investigations and prosecute such offences.

This twofold issue has reverberating impacts on the farmer's engagement with the NSW Police Force and potentially diminishes belief in the legal system to effectively intervene and deliver appropriate penalties and protect their privacy and security.

RECOMMENDATION:

That NSW work with the Australian Government to refer appropriate investigative authority under law to support timely on-ground investigations of illegal surveillance – both on ground and in air space.

Self-Incrimination

Obligation for the use of surveillance equipment by farmers as employers

Due to the unique circumstances of farming, security it is a significant concern for primary producers. With farming assets spread geographically (infrastructure and livestock) and relatively few close neighbours, farmers are vigilant for trespass. In a recent survey of members, 72% of respondents reported that they had experienced trespass and over 50% indicating that a trespass incident in the previous 6 months had occurred.

To allay their concerns and improve security 6.5% of respondents had installed motion sensor alarms, 23% installed motion sensor lighting, 45% video cameras, and 64% installed still cameras. The majority of respondents (61%) indicated that they were given no advice regarding the legal use and operation, 7% were provided with verbal advice, and only 3% were provided with written advice.

To understand if the respondents provided advice on the in-situ recording equipment, 42% indicated that they had erected signs, 10% had informed employees, while 55% had provided no information to employees, contracted workers, or visitors.

As the law appears to be clear on the employer responsibilities as it applies to 'overt' and 'covert' surveillance – observable as opposed to concealed; the lack of information on the legal operation of surveillance equipment is concerning.

In order to ensure that they are not conducting covert surveillance employers are required to check that the cameras or their housing can be clearly seen; that there are signs present at every entrance to the workplace informing people that they will be under video surveillance, and that all employees have been notified in writing of the purpose and coverage of the video surveillance at least 14 days prior to the installation of the cameras.

Employers use of surveillance equipment requires compliance with the *Surveillance Devices Act 2007* which regulates the installation, use, maintenance and retrieval of surveillance devices; the *Workplace Surveillance Act 2005*; which applies to privacy provisions; and the Department of Industrial Relations' Code of Practice for the use of Overt Video Surveillance in the Workplace.

It is generally accepted that whether a recording is reasonably necessary for the protection of the lawful interests of a party is objectively determined, having regard to the lawful interest existing at the time of making the recording.

RECOMMENDATION:

That sellers of equipment (online or shop-front retailers) that can be used for surveillance be required to provide written advice included in the packaging of the privacy obligations that apply under NSW law.

Unintended consequences of prescriptive requirements

Under current State and Commonwealth law all citizens can make oral and visual recordings as long as they are created within the established legal frameworks. It is also currently at the discretion of the owner of the legally made recording if they wish to make it available publicly, or use the information and images as evidence of a potential crime against themselves or others, to aid a potential prosecution of trespass or theft.

In recent years there have been legislative proposals to compel the disclosure of recordings that contain evidence of illegal actions, with a focus on instances of animal cruelty. Instances of animal cruelty need to be investigated promptly, to ensure that the relevant authorities can accurately attain the facts and those people whom have committed offences can be prosecuted.

The challenge of any legislative requirement is ensuring that its targets the illegal posting of unlawfully acquired surveillance information, as gathered by animal activists, and that there are no unintended consequences for those undertaking recordings within the requirements of the law.

Recommendation:

That in consideration of legislative responses to minimise inaccurate and unproven promotion of poor animal welfare practices, due process be included the right of farmers to undertake their business without compulsion to address unfounded claims.

Changing Media Environment

Unauthorised filming and surveillance has become more sophisticated, moving from fixed cameras to mobile videos and infrared video equipment. A key consideration in requiring better protections from unauthorised filming and photography is the ease and ability to upload and distribute this information to social media platforms and the media. While creating deterrence from unauthorised filming and photography in the first instance is one part of the issue, the second is what happens with this footage and photography after it is taken.

Different forms of media have proven to be beneficial for agriculture and the community through the ability to promote businesses, market products, and facilitate public education on agricultural issues. Many farmers now utilise social media to connect with consumers and differentiate their business and products from the competition. This public visibility potentially places these businesses at the forefront for negative commentary, trespass or surveillance activities.

In 2014, a number of piggeries were targeted through mediums such as Facebook and some of the comments were so negative that Facebook intervened to have a number removed. The immediacy of social media not only gives a new meaning to online harassment but shows the lack of protections in this media rich online environment. For some farmers the concern is so great that one member has reported that *“the risk of harm to my business and my family is terrifying”*.

There are generally three types of intent for trespass and unauthorised surveillance and filming, each with its own set of challenges to manage, including education, deterrence and penalties, categorised as:

- 1) General public who choose to take a photo or video of a farm because it is picturesque or interesting, who inadvertently trespass or take footage without the consent of the land owner,
- 2) Those with intent to trespass by filming or photographing what they determine are animal welfare issues with the intent on sending this to the enforcement authorities such as RSPCA or the police,
- 3) Those with the intent to trespass by filming or photographing what they determine are animal welfare or other issues, with the express intent to publish this footage to sensationalise or distribute to the wider public. An example of this is the Aussie Pigs website which hosts unauthorised footage of piggeries, including the location of the piggeries and the phone numbers of the private individuals.

Of the respondents to the NSW Farmers' survey who were aware that unauthorised footage had been taken, 71% had seen the information shared on Facebook, 21% had seen this in a newspaper, 14% in an interest group newsletter, and other sources including blogs, Instagram, and issue specific flyers.

Of this number only 14% had attempted to have this information that had been distributed without consent, removed. Additionally respondents also stated they were unsure where else the content was shared; their authority to have the content removed, particularly for internationally hosted websites; and that without clear legal authority they, or their industry associations had no power to have the content removed – regardless of its currency or accuracy.

There is little recourse for illegally obtained footage or photography to be dealt with once it has been loaded on social media sites, websites and, in some instances, with broadcasting agencies. A common issue that arises for farmers trying to have content taken down from online is the content being housed on a site that is based in another country. For example, if the hosting site is registered in the USA, as the content has not infringed any US law, there is no legal power or recognised model code of practice to block access to sites that contain illegal or misleading information in the jurisdiction in which the filming activity was undertaken.

While individual farmers have attempted litigation to remove unauthorised content, this has been exceptionally difficult through the inability to identify perpetrators, legislation not keeping pace with technology, and precedents set from other cases.

As raised in a number of cases, the distribution of illegally obtained content calls into question the role of the content in public debate and public interest. NSW Farmers supports education and open discussion of important issues and believes that accurate dissemination of information is required to help support public interest in an issue, such as animal welfare. Concerns arise when footage is illegally taken and sensationalised, including editing to seamlessly include with unrelated international footage and out-dated footage.

In 2017,⁷ SAWA were successful in preventing the ABC from broadcasting footage from their property. The case centred around the original intent on taking the footage, whether the defendant was part of the 'activity' as defined in the *Surveillance Devices Act 1998* (WA), and if the broadcast of the footage would further and protect the public interest. This case noted four points:

- A person who is a party to a private activity, such as a worker, may use optical surveillance devices to record visually the activity.

⁷ SAWA PTY LTD -v- AUSTRALIAN BROADCASTING CORPORATION [2017] WASC 349

Landowner protection from unauthorised filming or surveillance

- A person may publish the recording if a judge is satisfied the recording will further or protect the public interest, which in this case is animal welfare.
- The original intention of the recording was to deliver it to the RSPCA, which occurred.
- The subsequent delivery of the footage to the ABC for broadcast would not further or protect the public interest, as that could be achieved through discussion of the footage as had occurred in various publications already.

This case shows that public interest is given important consideration in the dissemination of footage. It also highlights that dissemination of content that further aids the public interest and protections, with little regard to the use of this information to sensationalise or distort the issue. NSW Farmers' does not support the illegal acquisition of footage and believes that there needs to be better legislative avenues and penalties to prevent the broadcast of illegally obtained content being broadcast.

Recommendation:

That the NSW Government explores stronger penalties and avenues of recourse for landowners to prevent the broadcast of illegally obtained content.