Submission No 144

INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM BILL 2019

Organisation: EDO NSW

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Portfolio Committee No. 4 – Industry
Legislative Council
NSW Parliament
Macquarie Street
Sydney NSW 2000

Submitted online and by email to: PortfolioCommittee4@parliament.nsw.gov.au

Dear Committee,

Inquiry into the provisions of the Right to Farm Bill 2019

EDO NSW is a community legal centre specialising in public interest environmental law. We provide advice on environmental, planning and natural resource management laws to clients across the state. Our clients include individuals, farmers, Aboriginal people, environment groups, and we also provide advice to government agencies on request.

EDO NSW also runs a Citizen Representation Program (**CRP**). The CRP provides specialist legal advice and information about the laws that regulate protest activities concerning the environment. In addition, the CRP provides legal representation to those who have been charged with criminal offences arising from their participation in such activities. In this context we welcome the opportunity to provide a submission on the *Right to Farm Bill 2019*.

This submission identifies four key areas of concern with the proposed Bill, namely:

- **Unnecessary regulation**
- **Scope of the Bill**
- **Increased penalties**
- **Nuisance provisions**

In light of these concerns our recommendation is that the bill is unnecessary, disproportionate and should not proceed. Instead the NSW government should complete the statutory review of previous amendments, including by undertaking fulsome public consultation and evidence-based analysis of the effect of the amendments.

1. The Bill is unnecessary

The intention of the Bill is to specifically target animal welfare activists trespassing on farms. In our view, the Bill is unnecessary as there is already sufficient regulation of the conduct purportedly targeted, when viewed in the context of the existing legislative framework which deals adequately with relevant offences including trespass, obstruction and criminal damage. We do not support unnecessary or duplicative regulation.[1]

[1] We note there is potential overlap with provisions of the *Biosecurity Act 2015 (NSW)* and the Commonwealth *Criminal Code Amendment (Agricultural Protection) Bill 2019* that was recently assented to on 19 September 2019.

2. Scope too wide and threshold lowered

Despite the purported intention of the Bill to target animal welfare activists trespassing on farms, the framing of the aggravated offence is not confined to achieve that objective and can just as easily apply to other kinds of political protestors and protest actions. In addition, the threshold for the commission of the aggravated offence is lowered by the Bill from *interfering* with the conduct of a business while trespassing to simply *hindering* the conduct of a business while trespassing. The application of the offence is therefore extremely broad and potentially covers activities significantly beyond animal welfare activists.

3. Increased penalties

The increase in the penalties proposed by the Bill comes just three years after a tenfold increase in the maximum fine for aggravated trespass from $550 to $5000 in 2016. At that time, there was significant public opposition to the legislation.[2] Following the passage of those amendments, a review was required, as enshrined by the legislation, to determine whether the policy objectives of those amendments remained valid.[3] It is unclear whether any such review has taken place and if so, what consultation process was performed and how the results of the review might have informed the formulation of this current Bill.

This current Bill seeks to increase the maximum fine for aggravated trespass again to $22,000 with a three year custodial sentence. Such a disproportionate penalty carries with it the potential to create a chilling effect on the preparedness of citizens to participate in peaceful protest.

As stated above, the framing of the Bill is sufficiently wide as to capture protest more broadly, rather than what was apparently intended. It is noted, legislative restraints on the freedom of political communication has been the subject of significant case law, including by the High Court of Australia in *Brown v Tasmania* [2016] HCA 43. It should be anticipated that a Bill of such extraordinary breadth must require careful scrutiny and may well become the subject of similar such litigation.

4. Nuisance provisions

Sections 4 and 5 of the Bill create what is referred to in the Second Reading Speech as a 'nuisance shield' through firstly taking the step of removing any right of recourse to the law of nuisance for certain commercial agricultural activities, and secondly, by modifying the discretion of the Court in remedying nuisance. In each case, we would question whether the provision and its impacts on the rights of adjacent landholders is a proportionate response to the problem identified in the Second Reading Speech.

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[2] https://www.abc.net.au/news/2016-03-16/nsw-increases-penalties-for-csg-protests-on-gas-sites/7249372

[3] See Schedule 5 of the ***Law Enforcement (Powers and Responsibilities) Act 2002*** relating to Part 9 Provision consequent on enactment of *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* that provides:

> **18 Review of amendments**
> (1) The Minister is to review the amendments made by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* to determine whether the policy objectives of those amendments remain valid and whether the provisions, as amended, remain appropriate for securing those objectives.
> (2) The review is to be undertaken as soon as possible after the period of 3 years from the commencement of that Act.
> (3) A report on the outcome of the review is to be tabled in each House of Parliament within 6 months after the end of the period of 3 years.

The Second Reading Speech appears to suggest that these provisions are a response to complaints about noise, dust, odour and other issues primarily in areas undergoing land use change.

Section 4: Lawful agriculture does not constitute a nuisance

This section has the effect that an action in nuisance will not be available in respect of a commercial agricultural activity if that activity is carried out lawfully, not negligently, on land that can lawfully be used for agriculture and on land which has been used for agriculture for at least the previous 12 months.

The primary difficulties with this provision are:

- The scale of the interference in the property rights of others that is authorised by this provision; and
- The fact that this 'shield' extends to changes in the nature of the commercial agricultural activity which may have quite significantly different impacts.

In ordinary usage 'nuisance' is a word which suggests a minor or trivial annoyance, however, the legal meaning of the tort of nuisance is something quite different. An action in nuisance is available where there is a substantial and unreasonable interference in the use or enjoyment of adjacent land. Nuisance is an evolving area of law with the result that types of interference in property rights which may constitute a nuisance are not yet closed but include noise, dust and odour as suggested in the Second Reading Speech but also include nuisance by flooding, fire, light and lateral support (eg: earthworks/retaining walls) for the land.

As a consequence, this Bill would allow commercial agricultural operators to substantially and unreasonably interfere with the property rights of the owners of adjacent land (including other agricultural operations) through the above means and in ways that are not presently ascertainable.

This is a disproportionate response to the complaints burden the Second Reading Speech suggests is afflicting farmers in certain areas.

While conflicting land use can certainly generate complaints and, occasionally, legal action, we do not believe that allowing one category of land users to permanently interfere with the rights of their neighbours is an appropriate solution. The most appropriate means of addressing these issues is through land use planning laws. If land use planning is not adequate on its own, then there are other options potentially available to address the issue (for example, modifying the defences available for nuisance with minimum practice standards) to protect existing agriculture without disproportionately interfering in the rights of other landholders.

The second significant problem with this provision is that it authorises nuisance from commercial agriculture on land, so long as that land has been used for *any agriculture* for at least the previous 12 months. 'Agriculture' is defined in the Bill to include aquaculture and forestry, with the result that it potentially includes activities ranging from low impact cropping and grazing to activities such as poultry farming and feedlots which have a much more significant capacity to create impacts on adjacent land.

While a buyer moving onto land adjacent to a grazing operation may be content to live with the impacts of that activity, they may well (quite reasonably) have a very different view of the impacts an alternative form of agriculture will have on their land. At most, such a provision should only provide a shield for continuing activities of the same nature and intensity.

Our primary **recommendation** is that this clause of the Bill should not proceed and that the government should seek alternative policy measures to address the problems identified in the Second Reading Speech.

If our primary recommendation is not accepted, then the provision should be limited to providing protections for agricultural activities of the *same nature and intensity* as those which were being carried out prior to the complainant buying or occupying their land.

Section 5: Courts not to order cessation of agricultural activities

Section 5 applies in circumstances where a Court finds that a commercial agricultural activity is causing nuisance. The clause provides that the Court must not order a complete cessation of the commercial agricultural activity if the Court is satisfied that it could make an order that would permit the continuation of the activity in a manner:

(a) that is managed, modified or reduced;
(b) consistent with an efficient and commercially viable agricultural operation; and
(c) unlikely to significantly disturb the other party to the proceedings.

We have two primary concerns with this provision.

We would not typically expect a Court to order that any activity cease without first attempting orders which would ameliorate the nuisance while allowing the activity to continue. However, we do believe that the threat of a more serious order is a good incentive for compliance with orders which fall short of ending the activity and that cessation may be an appropriate order in a small number of very serious cases. We also believe that, given the broad range of circumstances which can fall within the scope of nuisance, the Courts are best placed to exercise their discretion to produce an appropriate remedy.

The second, and more serious, issue with this provision is that is creates a new test which must be applied in formulating a remedy for nuisance which suggests that the Courts will not be empowered to impose remedies which fully address the relevant nuisance. The test above of 'unlikely to significantly disturb' makes it clear that some degree of the disturbance constituting the nuisance may well continue. Further, it is not at all clear to us how this new test of 'significant disturbance' is to be viewed against the 'substantial and unreasonable interference' constituting the nuisance.

We **recommend** that this clause not proceed.

We would be happy to discuss these concerns in more detail at the inquiry hearing on Thursday 3rd October.

If you require further information, please contact or on

Yours sincerely,
EDO NSW

Rachel Walmsley
Policy & Law Reform Director