Submission No 146

INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM BILL 2019

Organisation: New South Wales Bar Association

Date Received: 1 October 2019

NEW SOUTH WALES
BAR ASSOCIATION

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SUBMISSION TO PORTFOLIO COMMITTEE NO 4 INQUIRY INTO THE PROVISIONS OF THE RIGHT TO FARM BILL 2019

Introduction

1. The New South Wales Bar Association (**the Association**) has reviewed the legislative amendments proposed in the Right to Farm Bill 2019 (**Bill**) and in so doing has considered the October 2019 report of the Select Committee on Landowner Protection from Unauthorised Filming or Surveillance. The Association has also had regard to the NSW Parliamentary Research Service ebrief 5/2015, "Right to Farm Laws" by Gareth Griffith dated June 2015. That paper discussed the history and purpose of "right to farm" laws and their application in the United States and Canada.

Immunising those who carry out commercial agricultural activity from the common law tort of nuisance

2. Clause 4(1) of the Bill provides:

> *"No action lies in respect of nuisance by reason only of the carrying out of a commercial agricultural activity if—*
>
> *(a) the activity is carried out lawfully, and*
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> *(b) the activity is not carried out negligently, and*
>
> *(c) the activity is carried out on agricultural land, and*
>
> *(d) the land on which the activity is carried out has been used for the purposes of agriculture for a period of at least 12 months."*

3. The common law tort of nuisance has an important role to play in protecting the rights of people who are adversely affected by the activities of others on their land. The tort of nuisance is directed towards a person's actions that interfere with another person's use and enjoyment of their property. A nuisance may occur when someone or something unreasonably interferes with another person's ability to use or enjoy their property. The touchstone of the tort is unreasonable interference.

4. The proposed amendment adversely affects the property rights of landowners affected by nuisance. As was stated in relating to a "right to farm" nuisance-removal law by the Ontario Court of Appeal in *Pyke v Tri Gro Enterprises* (2001) 55 OR (3d) 257 at [75]:

> *This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.*

5. It is easy to contemplate examples of people, corporations, or even the Crown, who could be adversely affected by removing this tort and therefore, their recourse to damages and other relief. To take one example, imagine a situation where a flood of water from one farm causes a massive landslide on another farm, devastating crops and causing economic loss to the farmer. In the event that the flood was not caused through unlawful activity or negligence the affected farmer is without remedy. Indeed, it would seem that the proposed amendment is most likely to adversely affect other rural or semi-rural landowners more than anyone else. It may also have an impact on the Crown in so far as a person carrying out commercial agricultural activity pollutes land or waterways.

6. The Association sees no proper justification for entirely immunising one particular sector of the community – being those who carry out commercial agricultural activity – from a common law cause of action developed incrementally by the courts over a significant period of time. There are safeguards within the cause of action itself and in relation to the defences that have developed to answer it. Moreover, the Bill has not contemplated whether more carefully tailored approaches are available which could more appropriately balance the competing needs of farmers and those who live nearby them.

7. The Association does not support clause 4, which is a blunt instrument that makes no attempt to balance the competing rights and interests of those carrying out commercial agricultural activities and those affected by such activities.

Proposed amendments to the *Inclosed Lands Protection Act 1901 (NSW)*

8. Schedule 2 to the Bill sets out a series of amendments to the *Inclosed Lands Protection Act 1901* (NSW) (Inclosed Lands Act). The proposed amendments are explained on the basis that the NSW Government believes that current trespass penalties are not a sufficient deterrent to unlawful trespass activities and do not adequately reflect the seriousness of certain trespass conduct. Given the context of the Bill, these observations are understood to be made with respect to certain actions of animal welfare protestors.

9. Section 4B of the *Inclosed Lands Act* creates an offence of unlawful entry on inclosed lands. Section 4B(1) provides:

> *"Any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty not exceeding:*
>
> *(a) 10 penalty units in the case of prescribed premises; or*
>
> *(b) 5 penalty units in any other case."*

10. Section 4B of the *Inclosed Lands Act* creates an offence of aggravated unlawful entry on inclosed lands. Circumstances of aggravation include:

(a) interfering with, or attempting to interfere with, the conduct of the business or undertaking; or

(b) doing anything that gives rise to a serious risk to the safety of the person or any other person on those lands.

11. Item [4] of Schedule 2 to the Bill proposes to substantially increase the penalty for an offence against s.4B of the *Inclosed Lands Act* from 50 penalty units to:

> *(a) 120 penalty units or imprisonment for 12 months or both, or*
>
> *(b) 200 penalty units or imprisonment for 3 years or both if—*
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> *(i) the offender was accompanied by 2 or more persons when the offence occurred, or*
>
> *(ii) if the aggravating circumstances include those set out in subsection (1)(b).*

12. Three significant issues arise from this proposed amendment.

13. First, very large increases in penalties are proposed, which now include a term of imprisonment of up to 12 months. In view of the nature of the offence, imprisonment is a harsh and disproportionate penalty. The Association opposes this amendment.

14. Secondly, the term "inclosed lands" is defined in the *Inclosed Lands Act* to include "any land, either public or private, included or surrounded by a fence, wall or other erection". Consequently, the offence under s.4B(1) extends to anyone who enters into any public lands surrounded by a fence or other erection "without the consent of the owner, occupier or person apparently in charge of those lands".

15. Thirdly, there is no defence based upon peaceful protest or freedom of expression.

16. Therefore, members of the public who engage in peaceful protests on public land surrounded by a fence or other erection will be committing an offence which exposes them to a potential term of imprisonment for up to 12 months.

17. The existence of such a penalty is likely to discourage people from exercising their right to peacefully protest. Furthermore, those who do peacefully protest will be potentially exposed to a disproportionate and inappropriate penalty. The Association opposes the amendment on this basis as well.

1 October 2019