

**Submission
No 216**

**INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM
BILL 2019**

Organisation: NSW Young Lawyers

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Inquiry into the Provisions of the Right to Farm Bill 2019

1 October 2019

The Chair
Portfolio Committee No 4 - Industry
Parliament House
SYDNEY NSW 2000
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The NSW Young Lawyers Animal Law Committee (**ALC**) makes the following submission in response to the *Right to Farm Bill 2019 (Bill)*.

NSW Young Lawyers

While noting the limited time afforded to the community to assess and comment on the Bill, the ALC welcomes the opportunity to make this submission in response to the public consultation to the Inquiry into the Provisions of the Bill, and in particular its proposed amendments to the *Inclosed Lands Protection Act 1901 (the ILPA)*.

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The ALC comprises a group of over 400 members interested in animal welfare and laws regulating the treatment of animals. The ALC aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst ALC members is a passion and desire to use their legal skills and the law to improve the welfare of animals.

Summary of Recommendations

The ALC considers that the ILPA in its current form strikes an appropriate balance between prohibiting unauthorised entry onto private property and ensuring penalties are commensurate with the harms associated with such conduct.

The ALC also supports animal welfare issues being discussed openly in public forums. While individuals should not be encouraged to unlawfully enter onto private property, the ALC submits that the issue before the Committee Members to the Inquiry (**Committee**) is best addressed by providing law enforcement agencies with sufficient resources to effectively police animal welfare laws – reducing the incentive for private citizens to attempt to do so.

The ALC makes the following recommendations:

1. The Bill's amendments to the ILPA should not be supported until the Minister responsible for the ILPA tables a copy of the statutory review required under clause 18, Schedule 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to determine whether the policy objectives of those amendments remain valid and whether the provisions, as amended, remain appropriate for securing those objectives.
2. If the Bill's amendments to the ILPA are to be supported, they should not be supported in their current form and the following amendments to Schedule 2 should be made:
 - a. The amendments proposed by Mr Justin Field, MLC, addressing genuine peaceful demonstrations and protests;¹
 - b. Item [3] – section 4B(1)(h) be removed;
 - c. Item [4] – section 4B(1) maximum penalty be amended to remove the term of imprisonment;
 - d. Item [4] – section 4B(1)(b) be amended to require both elements to be satisfied before the higher maximum penalty is enlivened;
 - e. Item [5] – section 4C maximum penalty be amended to remove the term of imprisonment;
 - f. Item [6] – section 5(2) be removed; and
 - g. Noting proposed removal of terms of imprisonment, Item [7] Section 8 be removed.

¹ Proposed amendments to Right to Farm Bill 2019 (c2019-171A) located at: <https://www.parliament.nsw.gov.au/bill/files/3670/c2019-171A.pdf> (accessed 30 September 2019).

Detailed reasons

The Bill should not be supported in its current form

The ALC does not consider that the case has been made out for the need for the Bill's amendments to the ILPA. The ALC is concerned that agriculture has been given preferential treatment under the law by the removal of the rights of other citizens to raise genuine concerns with the conduct of agricultural options in a court of law. This sets a dangerous precedent. The proposed amendments to the ILPA are clearly designed to target animal protection advocates, referred to by the Minister in his second reading speech as "vegan vigilantes".²

The ALC notes that the *Inclosed Lands Protection Act 1901* was already amended in 2016 to address the particular concerns relating to the use of lock on devices and unlawful entry onto private property of the kind the Bill now seeks to address, by way of the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016*. That amending Act introduced section 4B of the ILPA, effectively increasing the penalty from 5 penalty units to 50 penalty units where a person unlawfully entered onto private property for the purpose of interfering with the conduct of the business or undertaking (or in other circumstances of aggravation set out in the section).

The Government at the time presumably made that amendment with the view that it would sufficiently cover protest activities across all types of private properties, including mine sites, forestry operations and agricultural properties. The amending Act included a provision requiring the Minister to undertake a review of the amendments to determine whether the policy objectives of those amendments remain valid and whether the provisions, as amended, remain appropriate for securing those objectives in accordance with clause 18, Schedule 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

That review was to commence as soon as possible three years after the commencement of the Act (1 June 2016), and was then to be tabled by the Minister within 6 months. It does not yet appear that the report on the review has been tabled in Parliament. Given that the review has not been undertaken (or, at least, has yet to be made public), the ALC is of the view that the Government has not made out the case on why the amendments made by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* are not sufficient to address unlawful entry onto private land. The Minister for Agriculture and Western New South Wales in his second reading speech noted that there has been an increase of 27% in the number of recorded incidents of trespass on farms and rural properties. However, the

² NSW, *Parliamentary Debates*, Legislative Assembly, 17 September 2019, (Adam Marshall, Minister for Agriculture and Western New South Wales).

Minister does not detail what proportion of these increases are of the kind to now be treated as aggravated offences (noting that sections 4 and 4AA of the Act also prohibit trespass but are not amended by the Bill), or whether these figures cover other trespass offences (for example, section 93H of the *Crimes Act 1900*), or if the 2016 reforms have reduced the occurrence of aggravated trespass successfully.

The ALC considers that the Government has not undertaken adequate review of the amendments made by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* to determine whether the measures enacted by that Act are sufficient to address the conduct proposed to be covered by the Bill. The ALC recommends that the Bill not be supported until the Minister responsible tables a copy of the review of the amendments made by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* to provide evidence on why the measures included in that Act need to be changed and to indicate what deficiencies, if any, exist in the current regulatory framework.

Recommendation 1

The Bill's amendments to the ILPA should not be supported until the Minister responsible for the ILPA tables a copy of the statutory review required under clause 18, Schedule 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to determine whether the policy objectives of those amendments remain valid and whether the provisions, as amended, remain appropriate for securing those objectives.

If the Bill is to be supported, the ALC submits that it should not be supported in its current form and the following amendments ought to be made:

Protection of genuine protests

The ALC notes that Mr Justin Field, MLC, has proposed an additional amendment to section 4B of the ILPA to the effect that the section will not apply to a genuine political demonstration or protest merely because that demonstration or protest happens to "interfere" with a business, with similar amendments to be made to the offences of interfering with a mine or obstructing functions under the *Forestry Act 2012*. The ALC considers those amendments to be plainly justified, and recommends that they be made.

It is a reality that peaceful demonstrations and protests will often cause some degree of interruption or inconvenience to those around them. To expose protestors to serious criminal penalties, up to and including imprisonment as proposed by the Bill (as addressed separately below), on the basis of such interruption is a gross overreaction and inconsistent with the standards of Australian democratic society.

The proposed carve-out from section 4B of the ILPA is limited only to that section, and only to subsection 4B(1)(a) (relating to interference with a business). It will not prevent protestors from being liable for breaches of sections 4 or 4A of the ILPA, nor from breaches of any of the other subsections of section 4B(1) of the

ILPA (for example, engaging in conduct giving rise to serious risks to safety, or creating biosecurity risks). The ALC submits that is an appropriate balance.

Removing terms of imprisonment from the maximum penalty

It is clear that the increased penalties provided for by the Bill are expected to be used against persons engaged in protests and similar political activity.³ While the ALC does not endorse unlawful entry onto another person's land, the ALC submits there is no good justification for imposing potential sentences of imprisonment upon persons who do not engage in any other conduct justifying imprisonment merely because it occurs upon someone else's land. Similarly, to the extent that trespassers do engage in serious unlawful conduct that would otherwise expose them to imprisonment, if that is already the case then there is no need for the additional punishment contemplated by the Bill.

The ALC accordingly recommends – if the Bill is to proceed – that the ILPA should not be amended to provide for potential terms of imprisonment. This is especially so if the Bill is not amended to include exceptions for genuine peaceful protests as proposed above.

Remaining provisions are amended to remove unnecessary duplication and penalties

The ALC proposes that Item [3], Schedule 2 (Amendment to *Inclosed Lands Protection Act 1901*) – section 4B(1)(h) is removed as the conduct is already sufficiently dealt with under section 4B(1)(a), as well as general damage to property offences under the *Crimes Act 1900*.

The ALC proposes that Item [4] – section 4B(1)(b) is amended to require both elements to be satisfied before the higher maximum penalty is enlivened. While the ALC does not support the current application of section 4B(1)(b) in that it punishes a person for putting their own safety at risk, and is targeted at protesting activity designed to draw attention to important public policy issues, the ALC proposes that if the aggravated penalty is retained, that the prosecution is required to prove both paragraph (i) and (ii). Noting the penalty is \$22,000, it is wholly appropriate this is only enlivened where multiple aggravating circumstances of already aggravated offences are made out.

The ALC proposes that Item [6] – section 5(2) is removed as it duplicates the conduct covered under section 5(1). While section 5(2) seeks to cover conduct relating to a gate across a road, the proposed section 5(1) already covers this conduct in that the provision is drafted broadly enough to cover all gates on inclosed lands.

³ See, for example, the Second Reading speech for the Bill at NSW, *Parliamentary Debates*, Legislative Assembly, 17 September 2019, (Adam Marshall, Minister for Agriculture and Western New South Wales).

Recommendation 2

If the Bill's amendments to the ILPA are to be supported, they should not be supported in their current form and the following amendments to Schedule 2 should be made:

- a. The amendments proposed by Justin Field, MLC, addressing genuine peaceful demonstrations and protests;
- b. Item [3] – section 4B(1)(h) is removed;
- c. Item [4] – section 4B(1) maximum penalty is amended to remove term of imprisonment;
- d. Item [4] – section 4B(1)(b) is amended to require both elements to be satisfied before the higher maximum penalty is enlivened;
- e. Item [5] – section 4C maximum penalty is amended to remove term of imprisonment;
- f. Item [6] – section 5(2) is removed; and
- g. Noting the proposed removal of terms of imprisonment, Item [7] Section 8 is removed.

Other commentary

“Ag-gag” describes laws that seek to hinder animal protection advocates from recording the operations of individuals and businesses in the animal agricultural industry and other animal use industries. Ag-gag laws purport to protect the interests of agricultural operators, but hinder transparency in the industry and prevent the public from being fully informed of poor animal welfare outcomes and practices. The ALC submits that the Bill in its current form could be interpreted by members of the community as an ag-gag law.

While the animal agricultural industry has argued that surveillance by animal protection advocates threatens animal safety and biosecurity, this surveillance has regularly stimulated community debate and been a mechanism for achieving positive animal welfare outcomes, through improving transparency and accountability. The High Court of Australia in *Lenah Game Meats* recognised the importance of transparency to promote debate for the effective operation of Parliamentary democracy and the improvement of animal welfare:

*Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate.*⁴

⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty*, (2001) 208 CLR 199, 218.

Transparency in the commercial animal agriculture industry is essential to expose poor animal welfare practices and standards, and it also ensures appropriate considerations are afforded to protect the welfare of animals. For example, there was public condemnation after covert footage of a New Zealand-owned company in Chile showed bobby calves being killed by blunt force trauma to the head on a farm. Such footage resulted in the New Zealand Government amending their *Animal Welfare (Care and Procedures) Regulations 2018* to ban the slaughter of bobby calves by such means.⁵ This exemplifies how covert footage can trigger legislative changes which improve the welfare of animals.

The ALC does not support unlawful entry onto private land, but does not consider that the current legal framework appropriately responds to the serious animal welfare concerns that have triggered people to undertake unlawful entry onto private land. The ALC submits that law enforcement agencies should be properly funded, and sufficiently independent, to undertake proactive investigations and enforcement operations to prevent animal cruelty offences occurring, and to appropriately punish industry misconduct. The appropriate way to deal with animal cruelty offences and industry misconduct is to address it directly, not to target those who seek to draw attention to it.

Concluding Comments

NSW Young Lawyers and the ALC thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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⁵ *Animal Welfare (Care and Procedures) Regulations 2018* (NZ) LI 2018/50, reg 8.