

**Submission  
No 190**

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

**Organisation:** NSW Nurses & Midwives' Association

**Date Received:** 1 October 2019

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**NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION  
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NEW SOUTH WALES BRANCH**



**Submission by the New South Wales  
Nurses and Midwives' Association (in  
conjunction with the Australian  
Nursing and Midwifery Federation  
NSW Branch)**

**NSW Legislative Council, Portfolio  
Committee No 4 - Industry**

**Inquiry into the 'Provisions of the Right  
to Farm Bill 2019'**

**1 October 2019**

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The Hon Mark Banasiak MLC  
Committee Chair  
Legislative Council Portfolio Committee No 4

**Attention:** Director, Portfolio Committee No 4 - Industry

**Online lodgement:**

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/lodge-a-submission.aspx?pk=2553>

**Re:** Inquiry into the 'Provisions of the *Right to Farm Bill 2019*'

The New South Wales Nurses and Midwives' Association, along with the Australian Nursing and Midwifery Federation NSW Branch ('Association'), the registered union in NSW and the NSW Branch of the Federally registered organisation for all employees working in nursing and midwifery classifications and roles. Members' workplaces include hospitals and nursing homes - these are "prescribed premises" in the "inclosed lands" definition.

The Association provides both industrial and professional support and representation to some 66,000 members in NSW. This ranges, for example, from the provision of information about workplace rights, providing direct support to members (and representation if necessary) with employers or before industrial or professional courts and tribunals, assistance with appearances before other courts and jurisdictions, as well as negotiating and bargaining on behalf of members with their employers for awards and enterprise agreements.

The Association supports the submission by our peak body, Unions NSW.

We welcome the opportunity to provide a submission to this Inquiry.

This submission is authorised by the elected officers of the New South Wales Nurses and Midwives' Association

**BRETT HOLMES**

General Secretary, NSW Nurses and Midwives' Association  
Branch Secretary, Australian Nursing and Midwifery Federation NSW Branch

## Executive Summary

Whilst *The Inclosed Lands Act (Right to Farm Bill)* (the Bill) is an Act to provide for matters relating to farm trespass and the defence of agricultural enterprises, the Association submits that the Bill extends well beyond the stated protection of farmers and agricultural activities and equipment.

We oppose any change that curtails the rights and liberties currently available to citizens, especially when it includes situations and settings well removed from the main 'object' of its stated intentions.

The Association is careful to conduct all activities legally and with due regard to the law. The Bill would impact on the right of nurses and midwives in NSW to protest peacefully on all inclosed lands – hospitals, nursing homes etc.

1. The Association opposes Schedule 2 of the Bill – it is unnecessary and should be rejected.
2. If Schedule 2 is not rejected, then amendments are required to direct offences and penalties to farming and agricultural endeavours, and explicitly exclude peaceful protests and union activities.

The Association notes that the ILP Act already differentiates between different types of inclosed lands and applies different penalties. Farming could be included as a "prescribed premises" attracting higher/different penalties without reformulating the existing balance between unlawful entry and aggravated unlawful entry – thereby leaving undisturbed the current legislative approach to all other inclosed lands.

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### **Format of this submission**

The following submission by the Association adopts, in the time available, the following approach. It sets out in brief terms the current legislative schema that most pertinently deals with the issues the subject of the *Right to Farm Bill 2019*. This also reviews the amendments made in 2016 via the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* which curtailed existing rights and liberties of the community.

The submission then reviews the stated intention and necessity of the *Right to Farm Bill 2019*, based upon information made available to the NSW Parliament. We then compare this stated intention or scope with its actual reach and potential to change and impact upon legislation pertaining to all inclosed lands. A further observation is made about what appears to be a disproportionate increase in penalties, without any evidence to advance why this may be necessary, and also looks at unintended consequences that may arise with the Bill in its current form.

The submission then lastly considers that if such changes are required to protect farming and agricultural activity, what may be a more prudent and desirable way.

# Terms of Reference

## Legislative Council Portfolio Committee No 4 – Industry

### Provisions of the Right to Farm Bill 2019

#### Terms of Reference

That:

- (a) the provisions of the Right to Farm Bill 2019 be referred to the Portfolio Committee No. 4 - Industry for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) that the committee report by Monday 21 October 2019, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

## (a) BACKGROUND

Protecting property rights (from trespass or damage), along with preventing interference with the conduct of a business, are long established rights as set out in legislation and determined by the courts. In NSW pertinent legislation in this regard include but is not limited to:

- *Inclosed Lands Protection Act 1901* ('ILP Act')
- *Law Enforcement (Powers and Responsibilities) Act 2002* ('LE Act')
- *Crimes Act 1900*

These rights and their 'reach' were only considered relatively recently by the NSW Parliament with the passage of the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (Amending Act 2016').

Arising from the passage of the Amending Act 2016, it remained an offence under the ILP Act for a person to enter into or remain in, without lawful excuse, inclosed lands without the consent of the owner. "*Inclosed lands*" is defined to include prescribed premises (being schools, childcare services, hospitals and nursing homes) or any public or private land enclosed by a fence or some natural feature.

However, the amendments created a new criminal offence ("*Aggravated unlawful entry on inclosed lands*") if the person while on inclosed lands:

- "(a) *interferes with, or attempts or intends to interfere with, the conduct of the business or undertaking; or*
- (b) *does anything that gives rise to a serious risk to the safety of the person or any other person on those lands.*"

These reaffirmed that the connection of any potential offence under the amendments remained connected to "*serious risk to ... safety*" or the interference with the conduct of a business. These were also in addition to the long existing offence of trespass.

Similarly, amendments contained in the Amending Act 2016 to the LE Act resulted in section 200 being amended and reading as follows:

- (1) *This Part does not authorise a police officer to give a direction in relation to an industrial dispute.*
- (2) *This Part does not authorise a police officer to give a direction in relation to:*
  - (a) *an apparently genuine demonstration or protest, or*
  - (b) *a procession, or*
  - (c) *an organised assembly,**except as provided by subsection (3) or (4).*
- (3) *A police officer is not precluded from giving a direction in relation to any such demonstration, protest, procession or assembly if the police officer*



*believes on reasonable grounds that the direction is necessary to deal with a serious risk to the safety of the person to whom the direction is given or to any other person.*

- (4) *A police officer is not precluded from giving a direction in relation to any such demonstration, protest, procession or assembly that is obstructing traffic if:*
- (a) *the demonstration, protest, procession or assembly is not an authorised public assembly for the purposes of Part 4 of the Summary Offences Act 1988 or the demonstration, protest, procession or assembly is not being held substantially in accordance with any such authorisation, and*
  - (b) *the police officer in charge at the scene has authorised the giving of directions under this Part in relation to the demonstration, protest, procession or assembly, and*
  - (c) *the direction is limited to the persons who are obstructing traffic.*

In short, these amendments permitted a police officer to issue a direction in two circumstances.

- i. A police officer can issue a direction to both an authorised assembly and any other procession/protest if it is designed to deal with a “*serious risk to ... safety*”.
- ii. A police officer can also issue a direction if the assembly/protest is “*obstructing traffic*” but only if it is unauthorised. An authorised assembly can have such direction made to it but only in the circumstance that it “*... is not being held substantially in accordance with any such authorisation*”.

By introducing a capacity to issue a direction due to traffic obstruction, it was presumed that this power or situation was not associated with public safety - rather inconvenience (otherwise there would have been no need to establish such a separate power).

However, it would be fair to say that at the time of the Amending Act 2016 being enacted, trade unions held some concerns as to whether any unintended consequences may arise. For example, despite the continuing exemption of “*industrial disputes*” in the LE Act, it was unclear what protections would be available in relation to activities by trade unions and their members in the form of a protest, demonstration or assembly which related to issues other than a specific dispute with an employer or employers.

Accordingly any further amendment or change to applicable legislation, no matter how well intentioned to protect farmers and farming land/equipment, would inevitably give trade unions and their members some cause for concern if it consequently reduced further their rights of peaceful assembly or protest.

**(b) RIGHT TO FARM BILL 2019 - STATED INTENTION**

The *Right to Farm Bill 2019* ('RTF Bill') was subject to a second reading speech by the Hon Adam Marshall MP, Minister for Agriculture and Western New South Wales, in which he clearly articulated the stated intention of the RTF Bill as follows:

*"This is an historic day for agriculture in New South Wales and Australia. For the very first time a bill to enshrine in law a farmer's right to farm their land, to grow the food and fibre to feed and clothe the people of this State, our nation and, increasingly, the world has been introduced, considered and hopefully will be agreed to by an Australian Parliament. The bill also delivers on a commitment this Government made to our State's farmers in the lead-up to the recent March election to introduce a right to farm bill to support them and the work they do in the strongest possible way."* [Hansard, Legislative Assembly, 17 September 2019]

It was designed to remedy the situation whereby:

*"Some unlawful trespass activity, including where masses of people can invade a farm to protest, exponentially increases the inherent dangers to both the farmer and the protestors themselves. Farm trespass, particularly of the scale and style we have recently experienced, presents multiple risks. Those risks relate to the safety of farmers, farm workers, farming families, emergency personnel, members of the public and farm animals."* [Hansard, Legislative Assembly, 17 September 2019]

The RTF Bill then seeks to address these very specific and precise concerns as follows:

Prevention of action for nuisance – property rights

*"The Bill limits the circumstances under which a claim of nuisance can be brought against lawful agricultural activity on agricultural land. This may impact on the right of a person to enjoy their property without interference from the activities of a neighbour. However, the Committee notes that this immunity only applies where activity is carried out lawfully on agricultural land and where the land has been used for the purposes of agriculture for at least 12 months. In addition, the Committee acknowledges that the Bill is intended to address the business impact on farmers and associated costs in time, energy and money as they answer claims against them for lawful activity. In the circumstances, the Committee makes no further comment."* [LEGISLATION REVIEW DIGEST, NO. 5/57 - 24 September 2019, pp 5]

Significantly increased penalties

*"The Bill significantly increases the maximum penalty for the offence of aggravated unlawful entry on inclosed lands from \$5,500 to \$13,200 and/or imprisonment for 12 months. The potential penalties rise to \$22,000 or three years imprisonment if the offender is accompanied by two or more persons or if s/he does anything to put the safety of any person at serious risk. Large increases in penalties can result in excessive punishment where the penalty is not proportionate to the offence. However, the Committee acknowledges that the penalty increase is designed to*

*better reflect the severity of the offences as well as the impact such offences have on farmers and primary production activities. It is also to account for the risks caused by trespassing on agricultural land and interfering with agricultural equipment and infrastructure. In the circumstances, the Committee makes no further comment.* [LEGISLATION REVIEW DIGEST, NO. 5/57 - 24 September 2019, pp 6]

### New offence

*“The Bill introduces a new offence that applies to those who incite or direct trespass without committing trespass themselves, which could attract a maximum penalty of 12 months imprisonment. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful. However, the Committee acknowledges that the purpose of this offence is to address a gap in the legislation where people incite or direct trespass without actually committing it themselves. Given that there is a public interest in protecting the rights of farmers from trespass on their land and the attendant risks to themselves and others that may eventuate, the Committee makes no further comment.”* [LEGISLATION REVIEW DIGEST, NO. 5/57 - 24 September 2019, pp 6]

It is clear then from any overview of the second reading speech, and the review conducted by the Legislation Review Committee as contained in the Legislation Review Digest, the RTF Bill is observed via the exclusive prism and perspective of preserving/protecting the rights of farmers, and preventing the risks associated with the interference with legitimate agricultural activities and equipment.

**(c) RIGHT TO FARM BILL 2019 - EXTENDING BEYOND ITS STATED SCOPE AND CONCERNS**

The changes contained within the Amending Bill 2019, despite the language and justification utilised for its necessity, goes well beyond the stated protection of farmers and agricultural activities and equipment.

The amendments proposed, as set out in Schedule 2, would impact upon and include all inclosed lands. As noted, the current definition of inclosed lands within the ILP Act is broad. It includes schools, child care services, hospitals, nursing homes, or any public or private land inclosed (in full or in part) by a fence, wall or some natural feature, including buildings which are in connection with this space.

It is not clear, and certainly not desirable, for a change stated to be required in a very specific industry or sector - arising as they do from a set of very prescribed actions - to however impact upon and include all inclosed lands as defined, without any evidence or justification as to why that breadth of change is necessary.

There is no evidence that the Association is aware of as to the necessity to further add to the changes implemented via the Amending Bill 2016 as they related to inclosed lands, changes which of themselves created concerns as to the erosion or limitations of rights to undertake peaceful assembly and demonstration.

Existing legislation already has a low threshold for unlawful entry onto inclosed land, including refusing to leave the land when requested to do so. Currently, a person is guilty of aggravated unlawful entry if they interfere with or attempt to interfere with a business or undertaking.

Further, the Amending Bill 2016 also extended in the *Crimes Act 1900* the definition of "mine" (and therefore offences available) to include any place at which gas or other petroleum is extracted, or areas in which physical exploration for minerals or gas occurs, or former mine areas that are being decommissioned or made safe.

Accordingly, it is not entirely clear as to how the current legislative schema and offences have been shown to be deficient in addressing or prosecuting those who may engage in the activities that have seemingly been the catalyst for the RTF Bill.

It is therefore equally of concern as to the necessity or imperative to introduce the new offence of a " *person hinders, or attempts or intends to hinder, the conduct of the business or undertaking*". It is unclear as to why this change is being sought and what intended actions are thought to be included in "hinder" that are not currently captured and dealt with adequately by existing provisions and offences directed to persons who conduct and do certain things whilst on inclosed land.

If destruction of property occurs, business owners are able to pursue damages through civil proceedings. The *Crimes Act 1900* prescribes that reckless destruction or damage of public property or property of another person is an offence and liable to imprisonment if a person or persons are found guilty.

Why are all these guarantees and existing legislative protections inadequate or not fit for the purpose of protecting farmers and agricultural activities and equipment?

And if the conclusion or evidence is that it falls short to protect these specific rural landowner's and their livelihood, why is it necessary to adopt the approach contemplated by the RTF Bill that extends to all inclosed lands and the activities associated with peaceful assembly and demonstration?

**(d) RIGHT TO FARM BILL 2019 - DISPROPORTIONATE INCREASE IN PENALTIES**

The creation of an 'aggravated unlawful entry on inclosed lands' offence in section 4B of the ILP Act involves the restriction of special categories of transgression. The gravity of the aggravated offence should be proportionate to the proposed penalty. Under the current legislation, the penalties for the aggravated offence are ten or five times more than that of the lesser offence.

However, the RTF Bill dramatically increases the penalty regime for aggravated unlawful entry to between 12 and 40 times more than the lesser offence with the additional option of imprisonment. This exponential increase in penalties for aggravated unlawful entry is well out of proportion with ordinary unlawful entry. Indeed, it is worth noting that much of the increased penalties are all directed to forms of aggravated unlawful entry listed within subsection 4B(1) which extend well beyond farming related matters.

The lack of proportionality within the amending legislation is exemplified by the lowering of the threshold within subsection 4B(1)(a) to include "*hindering*" the conduct of a business or undertaking. Indeed, this lowering of the bar will have the effect of conflating the unlawful entry and aggravated unlawful entry offences.

Amending subsection 4B(1)(a) to cover unlawful entries that hinder a business or undertaking extends the definition of aggravated unlawful entry too far. It is difficult to imagine many scenarios where an unlawful entry does not hinder in some way a business or undertaking. This has the effect of conflating sections 4 and 4B of the legislation. Indeed, the amending legislation will expand the scope of section 4B to cover much of the conduct currently covered by section 4 of the ILP Act.

In 2016 the aggravated offence for "*interfering*" with a business or undertaking was introduced. We understand that based on Penalty Notice Statistics publicised by Revenue NSW, there have been no penalty notices issued for this offence. However, the penalties have been increased significantly in the new Bill.

In general, the Association is unaware of any difficulties or inadequacies identified with the existing penalty and imprisonment regime set out in relevant legislation when dealing with such matters to of itself justify the proposed significant changes to penalties and offences.

**(e) RIGHT TO FARM BILL 2019 - UNINTENDED CONSEQUENCES**

In the limited time available, and noting the intended changes contained in the RTF Bill would extend to all inclosed lands, it is simply unclear as to whether unintended consequences would arise with its passage.

By further expanding the offences and penalties that may apply to conduct on inclosed lands, it is uncertain if it would, for example, impact upon the activities of trade union members (in our case nurses and midwives) from participating in peaceful actions on inclosed lands.

For example, if a peaceful assembly occurred on hospital grounds (or nearby public land) or carpark to hear and discuss issues pertaining to their workplace, would such behaviour be construed as being unlawful or attempting to hinder the operations of the business?

The Association takes very great care to conduct all its activities legally and with due regard to the law. However, when meeting with members, or encouraging members to meet to canvas their concerns and establish proposed resolutions to workplace issues with Association officers, could the Association be characterised as inciting or directing actions that may impact upon a business and its undertakings?

This offence is so broad that it may extend to endorsement or promotion of actions on social media, publications or mass meetings.

The narrative to the RTF Bill is conclusively about protecting farmers and their agricultural activities and equipment. However, it goes well beyond that and will potentially impact on a range of organisations and community groups within our society. Protests are an effective form of expression in a civilised and democratic society. As the Legislative Review Committee correctly notes, "... *the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.*"

Accordingly any change that curtails rights and liberties currently available to citizens must be carefully approached, especially when it includes within its ambit situations and settings well removed from the main 'object' of its stated intentions.

**(f) RIGHT TO FARM BILL 2019 - A BETTER APPROACH**

The Association is aware of reported coverage regarding actions towards farms and agricultural activities. The Minister of Agriculture's second reading speech sets out some examples and the concerns being expressed within rural communities.

It is not for the Association (in the absence of any clear data and evidence available to it relating to the magnitude of the problem or the demonstrated inadequacy of the current legislative schema) to pass judgement on the need for changes to protect farmers, their families, and the industry.

If the NSW Parliament was however to determine that such increased protections and penalties were required, then it would be better to clearly direct and articulate changes to that sector.

For example, either the RTF Bill could become self-contained and specifically direct and apply such offences and penalties to farming and agricultural endeavours whilst still explicitly excluding peaceful protests and union activities for workers in those industries.

Alternatively, the ILP Act already differentiates between different types of inclosed lands and applies different penalties as a result. For example, subsection 4(1) assigns different penalties to prescribed premises as opposed to any other case.

Accordingly, if reliance was to be placed upon the ILP Act, farming could be included as a prescribed premises attracting higher/different penalties (and/or additional offences) without reformulating the existing balance between unlawful entry and aggravated unlawful entry, and accordingly leaving undisturbed the current legislative approach to all other inclosed lands.