Submission No 356

INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM BILL 2019

Name: Name suppressed

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To the Portfolio Committee no 4 – Industry

Thank you for the opportunity to make a submission on the Right to Farm Bill 2019 ("the Bill").

The Bill aims to provide important protections for members of the agricultural industry to ensure that they are not unreasonably hampered in conducting their lawful agricultural activities. For example, by activists who trespass and use aggressive tactics and also by neighbours who complain of the effects of agricultural activities (for example, by claiming that the tort of nuisance applies as a result of a farming activity).

Whilst agriculture is certainly an important industry for Australia, I believe the provisions of this Bill work too much in favour of the agricultural industry (and unnecessarily so) in some important respects.

TORT OF NUISANCE

Clause 4 of the Bill provides that an action for the tort of nuisance cannot be brought in relation to a commercial agricultural activity if the activity is carried out lawfully (and not negligently) on agricultural land that has been used for the purposes of agriculture for at least 12 months.

I was concerned to read that the Bill proposes to impose significant limitations on the longstanding tort of nuisance.

The tort of nuisance is a fundamental legal principle that assists our society to function by allowing courts to effectively determine whether the activities of a neighbour impact on the other to a substantial and unreasonable extent.

Even when an agricultural enterprise is complying with specific legislation that applies to that industry and even where it is not negligent, it may still be committing a wrongful tort by interfering with the property rights of neighbours.

These are rights which should not be overridden by this Bill.

As summarised by the Australian Law Reform Commission (ALRC Interim Report 127 at 17.17), a tort is a legal wrong which one person or entity commits against another person or entity. The usual remedy is an award of damages and in some cases, an injunction to stop the wrong. Many torts protect fundamental liberties, such as personal liberty, and fundamental rights, such as property rights.

Importantly, according to the ALRC, a statute authorising conduct that would otherwise be a tort may therefore reduce the legal protection of people from interferences with their rights and freedoms. (See ALRC Interim Report 127 at 17.18)

EFFECT ON THIRD PARTY RIGHTS AND EXISTING SAFEGUARDS FOR AGRICULTURE

The Bill seeks to authorise conduct that would otherwise be a tort. In doing so, the Bill goes too far in reducing the legal protection of people from interferences with their rights and freedoms.

In particular, I am concerned that people or companies who are on a property neighbouring an agricultural enterprise will have undue restrictions on their fundamental right to use and enjoy their property.

For example, there will certainly be cases in the future where an urgent injunction is needed to stop a very harmful consequence of an agricultural activity. The provisions of this Bill could make such an injunction too difficult to obtain, at the risk of public safety and property damage.

Further, I believe there is already a safefguard here for the agricultural industry as courts do not grant such injunctions lightly. I would have thought that such injunctions are granted very rarely, and appropriately. I think there is already a suitable balance between the rights of the agricultural sector to operate and the rights of neighbours to enjoyment of their properties.

I believe that there is no need for there to be such hampering of the tort of nuisance by this Bill. The right to sue for the tort of nuisance is a right which all Australians need to ensure they have redress for a substantial and unreasonable interference with the use or enjoyment of a their land (such as ongoing toxic fumes or industrial waste entering their property or loud, ongoing noise).

It is important to note that the tort of nuisance does not apply where the interference is not substantial and unreasonable. For this reason, I believe there are already safeguards for the agricultural industries where the tort of nuisance is concerned.

COURTS ALREADY TAKE A COMMON SENSE APPROACH

It is for the court to decide what is substantial and unreasonable and this will often depend on the nature of the local area. The court will apply common sense in deciding this. For example, noisy or smelly factories will not normally be regarded as causing a nuisance if they are sited in industrial areas. Further, it will not normally be a nuisance if the occupier who suffers the damage has put up with it without complaint for a long time, or if the occupier suffered the damage because of an unusual sensitivity. (See, for example, the websites of the Legal Services Commission of South Australia and the Law Society of New South Wales.)

I believe courts in New South Wales should continue to decide if a particular interference by an agricultural activity is substantial and unreasonable enough to warrant an injunction to stop it. It is also possible that the neighbour to an agricultural activity may be conducting a commercial enterprise of equal or greater importance to the Australian economy than the particular agricultural enterprise next to it. However, this Bill could prevent that commercial enterprise from operating effectively if the tort of nuisance is limited as intended by this Bill.