



issues backgrounder

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Right to farm laws: an update

On 17 September 2019, the Minister for Agriculture and Western New South Wales, Adam Marshall, introduced into the Legislative Assembly the [Right to Farm Bill 2019](#). The Bill has two main parts:

1. A new Right to Farm Act to protect farmers from common law nuisance claims (known as “nuisance shield” legislation); and
2. Amendments to the [Inclosed Lands Protection Act 1901](#) to protect farmers from on-farm trespass activity.

The Bill has passed through the Legislative Assembly. On 24 September 2019, the Legislative Council’s Portfolio Committee No. 4 commenced an [inquiry](#) into the Bill. The Committee is due to report by 21 October 2019.

This issues backgrounder deals with the first part of the Bill – the nuisance shield legislation. It updates the 2015 e-brief [Right to farm laws](#), focusing primarily on significant developments in Australia.

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1. NEW SOUTH WALES

Right to farm policy (2015)

In December 2015, the NSW Government released a [NSW Right to Farm Policy](#). The policy's summary of actions states (p 7):

Reinforcing rights and responsibilities

- » The NSW Government will implement the Right to Farm policy to support farmers in exercising their right to farm.
- » The NSW Government will work with agricultural industries in NSW to support their efforts in establishing and maintaining best practice and minimising land use conflicts.
- » The NSW Government will encourage and support all participants in rural industry to promote good agricultural practice, technological and practical developments of modern farming equipment and techniques, and good neighbour practices.

Establishing a baseline and ongoing monitoring and evaluation

- » The NSW Government will work with local government and other stakeholders to identify and monitor nuisance complaints related to farming in relevant local government areas. Strengthening land use planning
- » The NSW Government will develop a suite of Regional Plans that identify regional priorities for growth, including for primary industries, as well as providing direction on managing land use conflicts.
- » The NSW Government will work with local councils to identify any additional measures required to assist their efforts in best practice land use planning to address land use conflict issues.

Ensuring current reviews of environmental planning instruments include consideration of options to ensure best land use outcomes and to reduce conflicts

- » The NSW Government will review current land use planning mechanisms and instruments, with the aim of delivering a planning policy framework that supports the management of current and future farming practices.
- » The NSW Government will review the findings of the current Legislative Council Inquiry into regional planning processes in NSW, which is due to report in 2016 and consider the recommendations, including any recommendations regarding the Right to Farm policy.

Improving education and awareness

- » The NSW Government will enhance its current engagement with local government, and in consultation with other stakeholders, support councils' proactive management and education on land use conflict issues that arise from lawful farming practices.

Considering the need for legislative options, should additional Government intervention be required.

- » The NSW Government will maintain its links with other jurisdictions to exchange information about developments in right to farm policy and legislation.
- » The NSW Government will report on the implementation of this policy on an annual basis.
- » The NSW Government will undertake a review after a period of two years of data collection or earlier if the evidence demonstrates the need. This review of the policy will

consider other jurisdictions and overseas experiences, as well as the outcomes of the Legislative Council Inquiry and determine if legislative options are necessary.

Legislative Council inquiry (2016)

The NSW Right to Farm Policy refers to reviewing the findings of an inquiry by the Legislative Council Standing Committee on State Development into regional planning processes in NSW. The Committee's [report](#), which was published in November 2016, did not explicitly mention the right to farm. However, some recommendations were of potential relevance to the issue, including:

- Recommendation 20: That the Department of Planning and Environment encourage local councils to consider determining fit for purpose land when developing Local Environmental Plans and land use strategies.
- Recommendation 21: That the Department of Planning and Environment conduct a review regarding the feasibility of implementing Priority Agricultural Areas, similar to the process adopted in Queensland.

The Government's May 2017 [response](#) supported both these recommendations.

Update on policy (2017)

A May 2017 [2016-17 Yearly Update](#) on the right to farm policy reported the following key achievements for 2016 (p 1):

- The first round of data collection to identify and monitor nuisance complaints related to farming in relevant local government areas is complete and is now available on the departmental website. The surveys with council are designed to determine frequency, nature and types of agriculture land use conflict
- The policy is providing a sound basis for local government and farmers to work collaboratively to resolve land use conflict
- Agencies have worked together with increased impetus on ways to improve planning instruments and address inconsistencies and ambiguity to drive the Right to Farm Policy
- Regional Plans, under development by the Department of Planning & Environment, now have actions to map important agricultural land, reduce fragmentation and minimise land use conflict
- An interjurisdictional forum has been established to ensure that agricultural land use planning experts across Australia can share experiences and learnings

No further updates have been published.

Agricultural land use survey report (2018)

In October 2018, the [Right to Farm- Agricultural Land Use Survey: Final Report](#) was published. It outlined the findings from surveys with local councils about agricultural land use conflict across NSW. Key findings included (p i-ii):

- In each year of the survey 30-50 per cent of respondents reported that at least half of their agricultural land use complaints are about compliant agricultural activities.

- Complaints continue to be most commonly about intensive agricultural activities, most notably poultry farms, broad acre cropping, fruit or nut growing, livestock grazing, piggeries and vineyards
- Noise, odour, dust, spray drift and escaping livestock are the most common triggers for complaints.
- Respondents believe that the biggest factors driving conflict across 2016 to 2018 were a lack of understanding amongst new residents of the realities of living in an agricultural area and of agricultural industry operation and lack of communication within the community and between neighbours.
- One-third of respondents in 2016 and 2017 reported that land use conflict is affecting agriculture in their LGA. This increased to half in 2018.
- The most common approach local councils use to manage land use conflict is the planning system, primarily via the conditions in their local environmental plans (LEPs) and development control plans (DCPs) around permissible land uses and buffer zones.
- Around 30 per cent of respondents reported that their local council delivers community education and engagement to minimise conflict but few believe that their efforts have been effective. However, the majority of respondents indicated that increasing community awareness of the realities of rural living, in particular new residents, would be effective to reduce land use conflict in their LGA.
- Most respondents are aware of the Right to Farm Policy (approximately 85%) but only half are aware of any of the actions within. Only nine per cent appear intimately familiar with the policy.
- Of those that have heard of the Right to Farm Policy, 29 per cent said that their local council has used it to inform decision making around agriculture in their LGA.

Planning reforms for primary production and rural development (2019)

On 28 February 2019, a new planning framework for primary production and rural development commenced. The Department of Planning, Industry and Environment's [website](#) states:

The new framework simplifies the NSW planning system by consolidating, updating and repealing provisions in five former agriculture-themed SEPPs.¹ It supports NSW's agricultural sector, which is a major contributor to the success of the NSW economy, providing exports and jobs.

The new framework:

- removes unnecessary regulation to support small scale operators and encourage investment in primary production
- assists in delivering NSW Government commitments in support of current and future farming practices, support during times of hardship, and management of land use conflict
- supports primary industry and rural communities by making it easy to find and understand local planning provisions
- supports sustainable agriculture, aquaculture and rural development by ensuring that appropriate levels of assessment are required in sensitive locations.

¹ State Environmental Planning Policies

Right to Farm Bill (2019)

In the [second reading speech](#) on the Right to Farm Bill 2019, Adam Marshall, the Minister for Agriculture and Western NSW, stated:

...the bill will introduce new legislation to help protect lawful primary producers from conflict and interference caused by neighbours and other land users. This new law, known as a nuisance shield, is based on Tasmanian legislation—the Primary Industries Activities Protection Act 1995. The nuisance shield provides a defence to common law nuisance claims levelled at farmers for what are normal farming activities—the smells, sounds and realities of their work. It will also stop courts from imposing injunctions on farmers without first considering other options. This is the first step in enshrining a farmer's right to farm their land.

The [Right to Farm Bill 2019](#) has the following nuisance shield provisions:

4. Lawful agricultural activity does not constitute nuisance

- (1) 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
 - (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.

- (2) In this section –

agricultural land in relation to a commercial agricultural activity carried out for, or in connection with, a particular type of agriculture, means land lawfully used for that type of agriculture.

5. Courts to not order cessation of agricultural activity if other order available

- (1) This section applies if in proceedings a court finds that a commercial agricultural activity carried out by a party to the proceedings constitutes a nuisance.
- (2) The court must not order the 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, and
 - (b) consistent with an efficient and commercially viable agricultural operation, and
 - (c) unlikely to significantly disturb the other party to the proceedings.
- (3) Subsection (2) does not limit or otherwise prejudice the power of a court to make any other order it thinks fit in respect of the nuisance, including an order as to damages or costs.

2. TASMANIA

Review of Act (2014)

In June 2014, the Department of Primary Industries, Parks, Water and Environment commenced a [review](#) of the *Primary Industry Activities Protection Act 1995*. The Government released the final review [report](#) in February 2016. The report stated that the general conclusions from the review process were (p 6-7):

- the Act has the support of the majority of the stakeholder community (as discussed below);
- awareness of the Act and its intended purpose appears to be low;
- the Act largely achieves the narrow goals set for it;
- the broader context in which the Act exists, including the 'right to farm', protection of agricultural land and other options to reduce land use conflict, is complex with very few easy answers; and
- the most effective way to reduce conflict between farmers and their neighbours is not through any legislation or policy, but through a commitment to ongoing and open communication and negotiation by the parties themselves.

Amendment of Act (2016)

In March 2016, the Government introduced into Parliament the [Primary Industry Activities Protection Amendment Bill 2016](#). The Minister [explained](#) that the Bill would address concerns raised in the review by simplifying the Act, and clarifying that planting trees, establishing forests, growing or harvesting timber is a protected 'primary industry' for the purposes of the Act. The Bill was passed by Parliament, and received royal assent on 23 August 2016.

The current provisions of the [Primary Industry Activities Protection Act 1995](#) include:

4. Primary industry activity does not constitute a nuisance in certain circumstances

A primary industry activity that is carried out on, in, immediately over or under an area of land does not constitute a nuisance if –

(a) the area of land is on a farm; and

(b) the area of land –

(i) is within a zone, designated to the land under the [Land Use Planning and Approvals Act 1993](#), that enables the land to be used for the purposes of primary industry; and

(ii) has been within that zone for a continuous period, beginning before the activity is carried out, of at least one year –

or the primary industry activity is a use that, despite the zone designated to the area of land, is authorised under the [Land Use Planning and Approvals Act 1993](#) and the use has been lawful for a continuous period, beginning before the activity is carried out, of at least one year; and

(c) the activity did not constitute, or would not have constituted, a nuisance if it had been carried out on that area of land at the beginning of the period referred to in [paragraph \(b\)](#); and

(d) the activity is not being improperly or negligently carried out.

5. Limitation on power of courts in respect of findings of nuisance

(1) If in any proceedings a court finds that a primary industry activity carried out by one party to the proceedings constitutes a nuisance, the court must not order the complete cessation of that activity if the court is satisfied that, by making some other order for the

management, modification or diminution of the activity reasonably consistent with efficient and commercially viable primary production, the court could reasonably ensure that any continuation of the activity would be unlikely to significantly disturb the other party to the proceedings.

(2) Subsection (1) does not limit or otherwise prejudice the power of a court to make any other order it thinks fit in respect of the nuisance, including any order as to damages or costs.

3. VICTORIA

Planning reforms for animal industries (2018)

In June 2018, the Government published a media release, [*Protecting the right to farm in Victoria*](#), which announced planning reforms:

The Andrews Labor Government is making planning fairer, simpler and easier to understand for Victoria's animal industries with the launch of significant reforms to Victoria's planning scheme.

Minister for Agriculture Jaala Pulford joined Member for Macedon Mary-Anne Thomas today to announce the sweeping reforms, which includes a \$450,000 training and education initiative targeted to pig and poultry producers.

The Labor Government consulted extensively to develop these reforms as part of the government's response to major changes in our animal industries. The new reforms bring clarity to land use planning definitions and balances the needs of agricultural businesses with environmental protection and the community.

The reforms introduce new land use definitions and associated planning controls for animal industries into the Victoria Planning Provisions and all planning schemes in Victoria.

New definitions and controls have been developed for grazing animal production, intensive animal production, pig and poultry farms, and poultry hatcheries.

The reforms provide farmers with greater flexibility to manage their farms, enabling them to make the most of market opportunities and manage seasonal risks. The reforms also introduce simplified planning processes to support outdoor pig and poultry farms that operate with low environmental and amenity risks.

For further information on the reforms, see:

- Agriculture Victoria, [*2018 planning reforms for animal industries*](#), [website].
- Victorian Government, [*The Victorian Government's response to consultation on proposed planning reforms for animal industries*](#), June 2018.
- Victorian Government, [*The Victorian Government's response to the Animal Industries Advisory Committee's Final report*](#), October 2016.
- Animal Industries Advisory Committee, [*Animal Industries Advisory Committee Final Report*](#), 29 April 2016.

4. PRODUCTIVITY COMMISSION

The Productivity Commission's November 2016 report [Regulation of Australian Agriculture](#) discussed conflicts between farming and residential land use, including the right to farm and nuisance shield laws (Ch 2.5). The report concluded (p 95):

Land conflicts should be addressed through the planning system

In principle, an effective regulatory regime would see land go to its highest value use. The highest value land use will depend on the circumstances of each case, such as the characteristics of the farm business and the residential area, and the magnitude of the nuisance. A policy that seeks to protect a certain land use by virtue of its incumbency risks generating a net cost to the community. This is especially the case if the magnitude of the nuisance changes over time (for example, due to new methods that enable an increase in the volume or intensity of production). In these instances, the highest value land use could change.

Nuisance actions protect the 'right of private enjoyment' from disturbance from many types of land uses — including business, manufacturing and other residential uses — and there is no principled reason why agricultural activity per se should be exempted. The availability of nuisance actions also does not prevent farm businesses from negotiating with neighbouring residents to allow the nuisance to occur. This could involve negotiating compensation or measures (by either party) to mitigate the nuisance.

In general, regulation that directly targets the regulatory problem is preferable to regulation that indirectly implements policy objectives. This helps reduce any unintended consequences of regulation and promotes regulatory transparency. For this reason, the Commission considers that nuisance shield legislation is not an appropriate mechanism for managing land use conflicts, as its function is to preclude a legal remedy, rather than to address the source of the conflict. As such, the Tasmanian Government should repeal the Primary Industry Activities Protection Act 1995.

5. UNITED STATES

For recent commentary on right to farm legislation in the United States, see Iowa State University Center for Agricultural Law and Taxation, [Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments](#), 28 May 2019.

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