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## Farm trespass, surveillance and the Biosecurity Bill 2015

by Tom Gotsis and Lenny Roth

### 1. Introduction

In recent years the farming community has been concerned about the increasing use by animal welfare activists of covert surveillance of farm properties.<sup>1</sup> Several incidents have allegedly involved unauthorised entry and installation of hidden cameras; in one case, Animal Liberation used a drone (otherwise known as an “unmanned aerial vehicle”). Farmers complain that this conduct constitutes an intrusion on their property and privacy rights, as well as causing biosecurity risks for animals. Conversely, animal welfare organisations maintain that there is inadequate policing of animal protection laws and they point to cases where covert surveillance has uncovered animal cruelty.<sup>2</sup>

In December 2014, the NSW Government released a Farm Trespass Policy which has several elements including significant penalties under proposed new biosecurity laws. On 12 August 2015, the Minister for Primary Industries, Niall Blair introduced into the Legislative Council the [Biosecurity Bill 2015](#). The Bill has not yet been debated. At the federal level, Liberal Senator Chris Back has introduced a Private Member's [Bill](#) which would create several new offences including: failing to provide to relevant authorities within 5 business days recorded material of malicious cruelty to animals; and engaging in conduct that damages property used in carrying on an animal enterprise.

There have been similar debates in the United States and new laws have been enacted or proposed in response at the Federal level and in several States.<sup>3</sup> These laws vary but include offences such as: entering a farm to take pictures by any means with intent to damage the enterprise; farm employees failing to submit a recording of suspected animal abuse to police within 24 hours; and entering a farm under false pretences or applying for employment at a farm with intent to record farm activities. Supporters of these laws describe them as “farm protection” laws while critics refer to them as “Ag-Gag” laws.

This paper looks at the debate in NSW and Australia, examines the current legal position in NSW in relation to unauthorised entry on to farm properties and farm surveillance, and outlines the NSW Government policy and legislative response. The

Private Member's Bill in the Senate and the *Biosecurity Act 2014 (Qld)* are also discussed, as are Law Reform Commission reports on privacy law.

## 2. Stakeholder views

### 2.1 Farmer organisations

**NSW Farmers:** In a June 2013 media release, NSW Farmers called on the State government to “take action on the issue of farm invasion by animal activists”.<sup>4</sup> NSW Farmers stated:

The call follows a second piggery invasion coming to light with the release of unauthorised night time footage of a NSW piggery by so called welfare activists.

NSW Farmers' President Fiona Simson said it is in the best interest of farmers and their business to ensure the safety and health of all livestock.

“But activists fail to realise they are compromising farm biosecurity by trespassing onto farms. Activists also conceal to consumers the negative affect that their presence at night has on animals. It not only wakes the animals up but the unexpected activity is interpreted as predator-like which actually stresses the animals and this is the part captured on film,” she said.

**National Farmers Federation:** In a December 2013 submission to the Australian Law Reform Commission inquiry on *Serious Invasions of Privacy in the Digital Era*, the National Farmers Federation commented on the use of drones by animal activists:

Animal Liberation in late March this year announced it had acquired one drone for the use of monitoring on-farm animal welfare. Some farmers have had positive experiences with using the technology for sustainable agriculture such as for weed mapping, crop monitoring etc. However given Animal Liberation's history of adversarial behaviour, the majority of farmers are strongly sceptical.

Apart from concerns about the drone being perceived by livestock as an aerial predator, there was genuine concern about unauthorised filming being an invasion of privacy. It did not matter if the drone was in a back paddock or near the house; to the landowner all is their privately owned and enjoyed land.<sup>5</sup>

The National Farmers Federation called for “the lawful use of unmanned aerial vehicles or drones to be clarified and appropriate legal remedies for unauthorised remote surveillance and digital trespass”.<sup>6</sup>

**Australian Pork Limited:** In a 2014 submission to the Competition Policy Review, Australian Pork Limited stated the actions of animal activists in illegally entering farms were a major concern for several reasons:

- Nuisance reports by these activists to relevant authorities of animal cruelty and the consequent investigation takes up valuable resources when pig farmers are acting appropriately and within the law;
- Resources of our industry and our producers are being wasted by being directed towards dealing with the activists rather than other more worthy initiatives;

- The costs of implementing additional security to warn of intrusion are very significant;
- The risk of disease incursion as biosecurity protocols are ignored is enormous, and the costs of this to industry and governments a potential time bomb;
- Negative animal welfare impacts, including the death of pigs as a direct result of the actions of activists has been recorded on a number of occasions;
- Stress on pork producers and their employees has been widespread on affected farms; and
- The threat to human safety due to the potential of confrontation is a major concern, including a risk of loss of life (activist, producer or their workers).<sup>7</sup>

The submission also stated that:

The ability for pork producers to take legal action against those perpetrators illegally entering premises is constrained by a number of factors:

- An inability to identify the perpetrators due to disguises being used – this affects a number of possible legal actions;
- The expiry of the statute of limitations for trespass in many states by the time the farm invasions are discovered;
- The reluctance of police and public prosecutors to take action (e.g. for trespass); and
- The inability to quantitatively demonstrate economic impact through the purchasing behaviour of consumers or the costs of preparing for or derived from farm invasions.

Investigations by APL of the legal actions available to producers and industry shows that in many cases present options provide a limited prospect of success. Apart from anecdotal evidence of endemic disease outbreaks and in Victoria, infrastructure damage and pig/piglet deaths, there is little evidence of economic impact. Such legal investigations have included trespass and surveillance legislation.

Even if a successful legal action could be implemented, the remedies are unlikely to act as a significant deterrent to continued action from fanatical activists.<sup>8</sup>

**Australian Lot Feeders Association:** In a submission to the Australian Law Reform Commission inquiry mentioned above, the Australian Lot Feeders' Association commented on the use of drones:

The recent purchase of a drone by Animal Liberation to capture footage of intensive livestock farms similarly takes advantage of the inadequacies of current privacy and common law. As it currently stands, it is understood that there is no statutory cause of action under state or federal privacy and common law in relation to the use of drones fitted with surveillance cameras over private property. It is accordingly clear that current law has not kept up to date with advances in such technology and their transition from military to civilian application from a privacy context.<sup>9</sup>

It stated that it did not support the unauthorised use of drones over feedlots for a number of reasons including:

- Lot feeders have a demonstrated willingness to allow visitors onto their property to show and explain their feedlot and activities;
- Animal welfare legislation allows the RSPCA to enter feedlots if any animal welfare issue is suspected;
- The industry's quality assurance program, the National Feedlot Accreditation Scheme allows independent auditors to enter accredited feedlots if any animal welfare issue is suspected;
- Drones may stress or cause injury to cattle by flying too close. Panicked cattle can run into fences and injure themselves if they are unduly stressed by objects that they see as unfamiliar...;
- The only individuals or groups who are likely to use drones over cattle feedlots are those which use them for unauthorised and malicious purposes. Specifically their deliberate intention is to deceptively obtain, selectively edit and utilise such footage to denigrate the reputation of the wider feedlot industry;
- Lot feeders are law abiding citizens who have a right to be treated with dignity and the privacy of themselves and their property respected.

The Australian Lot Feeders Association supported “the introduction of a statutory cause of action for invasions of privacy involving the unauthorised use of drones over private property, particularly when footage is deceptively obtained and intended to be used for malicious purposes”.<sup>10</sup>

## **2.2 Animal welfare organisations**

***Voiceless and Barristers Animal Welfare Panel:*** In a December 2013 submission to the Australian Law Reform Commission, Voiceless and the Barristers Animal Welfare Panel submitted that surveillance by animal welfare advocates and organisations is usually carried out where a complaint has been made about serious cruelty or neglect occurring at a facility.<sup>11</sup> The submission noted that it did not condone illegal activity but asserted that there were considerable public interest considerations in favour of farm surveillance not attracting civil or criminal liability including:

(a) The surveillance under discussion provides the public with a significant degree of visibility of commercial animal facilities. Such facilities are often located on private property, “behind closed doors”, and in the absence of surveillance, the public may, in a practical sense, have no other way to witness what transpires within the facilities.

(b) Surveillance footage, often graphic and confronting, promotes public awareness of, and encourages public debate about, issues of a political nature, including animal welfare, consumer protection, food safety and criminal justice.

(c) Surveillance facilitates the effective monitoring and enforcement of animal welfare regulations. Public outcry following the dissemination through the media or internet of surveillance footage provides animal welfare and other regulators with a potent incentive to investigate the relevant facility, and to enforce animal protection regulations in relation to the incident captured in the footage.

(d) Surveillance footage itself may constitute direct evidence of animal cruelty or neglect, which, in the hands of an animal welfare or other regulator, can be adduced as evidence in court proceedings relating to the relevant cruelty or neglect.

(e) Serious animal cruelty and neglect, in contravention of animal welfare regulations, are widespread in the Australian agricultural industry. Surveillance, for the reasons referred to in the foregoing paragraphs, assists with reducing the rate of contravention and improving animal welfare standards.<sup>12</sup>

They also argued that there were significant barriers to the enforcement of animal welfare regulations, including inadequate numbers of welfare inspectors, and budgetary constraints of animal welfare organisations.<sup>13</sup>

***Voiceless, Animals Australia, Friends of the Earth, Greenpeace, Animal Defenders Office ACT:*** In 2014, several animal protection organisations made a joint submission to the NSW Government on the *Framework for a NSW Biosecurity Act*, stating:

We wish to acknowledge that it is already unlawful to trespass onto private property and to use undercover surveillance devices. Strong legal protections already exist to protect both producers and the public from potential biosecurity threats presented by unlawful trespass. As such, ag-gag legislation serves only to shield the commercial interests of intensive farming operations and to stifle transparency about the standard practices on factory farms. This is an illiberal response which is inconsistent with the Australian public's rights to free speech, freedom of information and freedom of the press. As such, it will have significant implications for animals, consumers, media and for all members of the Australian public.

Most farmed animals in Australia are raised behind closed doors, deliberately hidden from public scrutiny. Footage provided by employees, whistleblowers and animal activists taken within factory farms is one of the only insights we have into the treatment of intensively farmed animals. Surveillance footage has also exposed evidence of animal cruelty, neglect and violations of animal protection laws within factory farms, and has proved an effective enforcement tool in exposing cruelty that would have otherwise gone undetected. Covert footage is admissible as evidence in court, and indeed, has been critical in prosecuting individuals and corporations charged with breaching animal and consumer protection laws (examples of which have been provided in Appendix 1). Based on this historical evidence, it is clear that if ag-gag laws are introduced in NSW, they will operate to conceal incidents of cruelty as they occur on factory farms.<sup>14</sup>

***RSPCA Australia:*** In a 2013 discussion paper entitled *Ag gag' laws in Australia?* RSPCA Australia stated:

The RSPCA shares the concerns of livestock industries relating to biosecurity risks to animal health and private property rights. Equally however, the RSPCA shares the community's concern about transparency in food production, particularly in relation to the treatment of livestock. Ag gag laws fail to address all of these concerns. They generate distrust within the community and may in fact be counterproductive in providing greater social legitimacy to the actions of activists. There is a high degree of sensitivity within the Australian community about the treatment of animals in farming contexts. Much of this can be attributed to investigations into controversial livestock production practices, both domestically and abroad. Proposing Ag-gag laws in this climate will further damage the reputation of Australia's agricultural industries and may further accentuate tensions between city and rural communities.

Transparency and the treatment of livestock are primary concerns within the community. The RSPCA believes that livestock industries should pro-actively

engage with consumers to address these concerns. Improving animal welfare on farm, during transport and at slaughter requires on-going commitment from all participants along the supply chain. Acknowledging the need for incremental improvements, setting targets for achieving them, and keeping the community informed about progress will go a long way to building trust and confidence and ensure the long-term future of livestock production. Other strategies for promoting transparency may include greater method of production labelling schemes including rigorous third party auditing, the installation of closed circuit television cameras (CCTV) within livestock facilities, and the development of farm visitation programs to allow the public to meet with producers and view operating farms. Additionally, greater investment by state and territory governments in inspection and monitoring programs for livestock facilities will help to restore community confidence in the regulatory framework for farm animal welfare.<sup>15</sup>

On the issue of the use of drones, the RSPCA made the following submission to the Australian Law Commission:

The impact of drone use on personal privacy is not a matter the RSPCA feels it is in a position to comment on. The Commission is certainly better placed to determine whether using drones to film commercial farming operations should be subject to a cause of action for 'serious invasion of privacy' and we will respect the Commission's determination in this regard. In considering the issue we would however ask the Commission to take into account the following matters:

- The difficulties in monitoring animal welfare, particularly relating to livestock due to the remote locations of many operations and the lack of resources made available by state governments for compliance inspections.
- The strong public interest in animal welfare and growing demand for greater assurances regarding the welfare of animals used in the course of producing food and fibre.<sup>16</sup>

### 3. Current legal position

#### 3.1 Animal cruelty laws

The relevant law is to be found in the *Prevention of Cruelty to Animals Act 1979*, the *Prevention of Cruelty to Animals Regulation 2012*, and the Codes of Practice and Standards listed in Schedule 1 of the Regulation. Section 530 of the *Crimes Act 1900* separately prohibits serious animal cruelty. [National Model Codes of Practice for the Welfare of Livestock](#) are also relevant.

**Objectives:** The *Prevention of Cruelty to Animals Act 1979* has two objects: firstly, to prevent cruelty to animals; and, secondly, to promote the welfare of animals.<sup>17</sup>

**Offence of animal cruelty:** To further its objects, the *Prevention of Cruelty to Animals Act 1979* creates a range of offences, including the core offences of prohibiting an act of cruelty or aggravated cruelty upon an animal.<sup>18</sup> An act of cruelty includes any act or omission leading to the animal being "unreasonably, unnecessarily or unjustifiably":

- beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated,
- over-loaded, over-worked, over-driven, over-ridden or over-used,

- exposed to excessive heat or excessive cold, or
- inflicted with pain.<sup>19</sup>

“Aggravated cruelty” is defined to mean an act of cruelty that results in the death, deformity or serious disablement of the animal; or the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.<sup>20</sup>

The Act provides certain defences to these offences.<sup>21</sup> Those defences effectively permit such farming practices as branding, castrating, dehorning, tailing and mulesing, if the procedure was conducted in a manner that inflicted “no unnecessary pain” upon the animal. Further, it is a defence to the charge of animal cruelty that the conduct in question involved “destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption”,<sup>22</sup> and inflicted “no unnecessary pain” upon the animal.

Section 530 of the *Crimes Act 1900* creates the offence of serious animal cruelty. Section 530(1) provides that a person who, with the intention of inflicting severe pain, tortures, beats or commits any other serious act of cruelty on an animal; and kills or seriously injures or causes prolonged suffering to the animal, is guilty of an offence and is liable to a maximum penalty of 5 years imprisonment. However, under s 530(2), a person is not criminally responsible for an offence against s 530 if, relevantly, “the conduct occurred in the course of or for the purposes of routine agricultural or animal husbandry activities”.

**Code of Practice and Standards:** The Codes of Practice and Standards in Schedule 1 of the *Prevention of Cruelty to Animals Regulation 2012* are enforceable,<sup>23</sup> as are the Standards in respect of caged and non-caged egg laying fowl, which are contained in the regulation itself.

**Enforcement:** The key agencies responsible for investigating offences against the *Prevention of Cruelty to Animals Act 1979* are the police, Animal Welfare League and RSPCA.<sup>24</sup> Prior to the commencement of the *Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007*, which also arose out of concerns relating to farm trespass and surveillance, private parties could prosecute a breach of the *Prevention of Cruelty to Animals Act 1979* and the regulations.<sup>25</sup>

The Act provides inspectors with powers to enter farms to investigate offences against the Act. To enter land inspectors generally require the consent of farm owners, a search warrant to enter land or a reasonable ground for believing that an animal has or will suffer significant physical injury or has a life threatening condition that requires veterinary treatment.<sup>26</sup> The powers of inspectors extend to land used for sale-yards or land on which farm animals are kept for commercial purposes.<sup>27</sup>

It is argued that the enforcement of animal welfare laws is a particularly difficult issue in a farming context because:

[M]ost crimes against farm animals take place on private property, in remote locations far removed from the public eye. In many cases, investigating authorities have to rely on whistleblowers (employees who allege misconduct on the part of their employers) or “tip-offs” from third parties that

have unlawfully trespassed on factory farms and witnessed animal suffering.<sup>28</sup>

### 3.2 Trespass

Farm trespass is prohibited under the *Inclosed Lands Protection Act 1901*. A civil law action in trespass is also available.

#### 3.1.1 *Inclosed Lands Protection Act 1901*

The object of the *Inclosed Lands Protection Act 1901*, which has been described by the courts as having a “rural and agricultural” flavour,<sup>29</sup> was to protect inclosed lands from “intrusion and trespass”.<sup>30</sup> The Act was augmented in 1979 when the separate offence of trespass previously contained in s 50 of the *Summary Offences Act 1970* was abolished and the *Inclosed Lands Protection Act 1901* was amended to encompass that offence.<sup>31</sup> Section 4(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...

Farms that are surrounded by a fence, or by a fence and a natural feature such as a river or cliff, fall within the definition of “inclosed lands” in s 3.

In respect of farms, the offence carries a maximum penalty of 5 penalty units (\$550).

It is not clear whether the operation of a drone above the surface of inclosed lands could constitute “entering into” those inclosed lands.

#### 3.1.2 *Civil law action in trespass*

In its Discussion Paper on [Serious Invasions of Privacy in the Digital Era](#), the Australian Law Reform Commission points out that the “ancient tort of trespass to land” can provide protection against unauthorised intrusions into property.<sup>32</sup> Trespass is “actionable per se”, meaning:

...that the tort is actionable when the interference occurs, without the need for the claimant to establish any recognised form of damage such as personal injury, psychiatric illness, property damage or economic loss.<sup>33</sup>

With respect to potential damages, it states:

“General” damages, sometimes substantial, are awarded to compensate the claimant for the wrong that has occurred, and for any actual damage sustained, or by way of solace or vindication of his or her rights. Aggravated damages may be awarded where there is a special humiliation of the claimant by the defendant. Exemplary or punitive damages may be awarded where the defendant has acted intentionally or maliciously and in arrogant or contumelious disregard of the claimant’s rights. Claimants may seek injunctions to restrain the broadcast of video material recorded without authorisation while a defendant was trespassing on land, although damages have been deemed an adequate remedy in cases involving commercial enterprises.<sup>34</sup>

**Windridge Farm Pty v Grassi:** In *Windridge Farm*<sup>35</sup> trespass was relied on by the operator of a piggery (the plaintiff) as the basis of a cause of action against animal activists (the defendants) who had entered its premises at night without permission and took photographs and video footage of the animals and facilities. The images were then provided to Animal Liberation NSW, which claimed that the pigs, contrary to the relevant standards, were being kept in cramped conditions. The Police and RSPCA investigated the allegations but did not take any action against the plaintiff.<sup>36</sup>

The piggery had Australian Pork Industry Quality Program certification and operated in accordance with stringent bio-security measures.<sup>37</sup> These measures included controlling visitor movements and requiring visitors to wear protective clothing. Signs were installed on the property that read “Attention: Quarantine area. Do not enter past this point”.<sup>38</sup> The defendants did take some precautionary steps to avoid the risks of contamination, such as disinfecting their shoes and wearing “special suits”, but Hall J found that their actions “fell well short of the high standards that had been implemented by the plaintiff to guard against such a risk”.<sup>39</sup> Nevertheless, no contamination occurred as a result of the defendants’ trespass and surveillance.<sup>40</sup>

It was not disputed that the defendants had trespassed onto the plaintiff’s property.<sup>41</sup> The court held that the trespass entitled the plaintiff to an award of damages.<sup>42</sup> As Hall J said those damages should “reflect the significant purpose of vindicating the plaintiff’s right to exclusive occupation”.<sup>43</sup> That right, his Honour continued, should be seen in light of the following considerations:<sup>44</sup>

- The plaintiff’s premises were well secured by fencing and other devices. The security measures were not just to protect the plaintiff’s property but also to protect the plaintiff’s operations, which required adherence to strict biosecurity and regulatory measures.
- The defendant’s trespass represented a serious unlawful intrusion into premises on which specialised commercial operations were being conducted.
- The trespass carried a risk for serious harm to the plaintiff’s operations.
- The evidence demonstrated that the trespass caused genuine and serious concerns and agitation amongst the plaintiff’s staff, given the nature of the operations they were conducting.
- The unlawful invasion was carried out at night in circumstances in which the possibility of detection and for taking protective action was limited.

Taking those factors into account, Hall J awarded general damages in the amount of \$15,000.<sup>45</sup> His Honour also awarded special damages, in the sum of \$1,625.45, to cover the expenses incurred by the plaintiff engaging a vet to inspect the pigs for signs of disease.<sup>46</sup>

His Honour did not consider that the prerequisites for an award of aggravated or exemplary damages for trespass to land were established.<sup>47</sup> The evidence did not establish that the plaintiff suffered any pecuniary harm or loss of reputation or goodwill by virtue of the defendants’ trespass

and surveillance.<sup>48</sup> Nor did the evidence establish that the defendants acted with vindictiveness, malice or intention to embarrass or inflict hurt or injury.<sup>49</sup> Their intention was to provide evidence of animal cruelty to the police and RSPCA.

**Trespass by drone?** On the question of whether a property owner could sue for trespass if a drone were to fly above its land, Professor Butler notes:

It has long been established that the right to sue for trespass to land is not limited to interferences on the surface of the land alone but extends to infractions of the air space above the land. However, that right...is limited to the height of reasonable usage.

...

...[Drones] may reach a height above that which would be necessary for the ordinary use and enjoyment of land, and therefore fly in airspace which a landowner has no greater rights than any other member of the public.<sup>50</sup>

### 3.3 Surveillance

The *Surveillance Devices Act 2007* prohibits surveillance where this occurs on the premises of the relevant farm. In respect of surveillance that occurs from outside the farm site, a civil law action in nuisance may be available.

#### 3.3.1 Surveillance Devices Act 2007

**Installation, use and maintenance of optical surveillance devices without consent:** Where farm surveillance follows “entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises”, it contravenes s 8(1) of the *Surveillance Devices Act 2007*, which states:

A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves:

- (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
- (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.

The provision applies to farms because “premises” is defined by s 4(1) of the Act to include: land; a building; a part of a building; and any place, whether built on or not.<sup>51</sup>

The maximum penalty for an offence against s 8(1) is 500 penalty units (\$55,000) in the case of a corporation; or 100 penalty units (\$11,000) and/or 5 years imprisonment in any other case.

While s 8(1) prohibits on-site farm surveillance, it does not prohibit animal activists conducting off-site surveillance. With respect to the use of drones, Professor Butler explains the legal position by way of an example involving a person (the pilot) using a drone to spy on their neighbour. He states:

[T]here may be a use of an optical surveillance device 'on or within premises...to record visually or observe the carrying on of an activity'. If the adolescent neighbour were to fly the [drone] over the homeowner's premises then there may be an 'entry onto or into premises without the express or implied consent of the owner or occupier'. However, if the adolescent neighbour were to hover the [drone] over his or her own side of the fence in order to record visually or observe the activities on the other side, this section would not be breached.<sup>52</sup>

**Prohibition on communication or publication of private conversations or recordings of activities:** If animal activists publish the activities that are recorded by onsite surveillance they may be contravening s 11(1) of the *Surveillance Devices Act 2007*, which provides that:

A person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part.

The offence carries a maximum penalty of 500 penalty units (\$55,000) in the case of a corporation; or 100 penalty units (\$11,000) and/or 5 years imprisonment in any other case.

Like s 8(1), s 11(1) does not cover offsite surveillance. As s 11(3) provides:

A person who obtains knowledge of a private conversation or activity in a manner that does not involve a contravention of a provision of this Part is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened this Part.

### **3.3.2 Nuisance**

As reported by the Australian Law Reform Commission in *Serious Invasions of Privacy in the Digital Era*, a person conducting off-site surveillance:

[M]ay be liable in the tort of nuisance for an unreasonable interference with an occupier's use and enjoyment of their land. For example, a person may be found liable in nuisance for keeping the occupier under surveillance or by positioning cameras or lights in situations where they interfere with, record or snoop on the occupier's activities. As in trespass, only the occupier with a right to exclusive possession may sue in nuisance, and the cause of action has been denied to other lawful occupants of the land who may be there under licence from the occupier.<sup>53</sup>

The operation of the tort of nuisance in the context of off-site surveillance was illustrated in *Raciti v Hughes*.<sup>54</sup> In that case, the plaintiff and defendant were neighbours. The defendant installed floodlights and camera surveillance equipment on his property, which were positioned so as to illuminate the plaintiff's backyard and record what occurred in the plaintiff's backyard. The floodlights appeared to be activated by a sensor which switched them on after detecting movement in, or noise emanating from, the plaintiff's backyard. The plaintiff claimed that the lights and cameras interfered with his and his family's use of the backyard.

Young J said: “There is no doubt that as a general rule what one can see one can photograph without it being actionable”.<sup>55</sup> Notwithstanding this general rule, Young J held that “the deliberate attempt to snoop on the privacy of a neighbour and to record that on video tape ... is an actionable nuisance”. The lights and the surveillance equipment, individually and together, were sufficient to give the plaintiffs a cause of action in nuisance.<sup>56</sup> This suggests that a farmer may be able to bring an action in nuisance in relation to the use of a surveillance drone above its property.

### 3.3.3 Privacy tort and equitable doctrine of breach of confidence

The issue of whether farmers whose properties have been the subject of farm trespass and surveillance may be able to rely on a privacy tort or on the equitable doctrine of breach of confidence was considered by the High Court in *Australian Broadcasting Corporation v Lenah Games Meats Pty.*<sup>57</sup>

Lenah operated a licensed abattoir in Tasmania which “processed”, amongst other things, brush tail possums. Lenah asserted that animal activists had, without its knowledge or consent, installed three cameras on its property, filmed the stunning and killing of brush tail possums, retrieved the footage and had given it to the ABC, which was intending to broadcast it as part of a segment on the *7.30 Report*.<sup>58</sup> The full court of the Supreme Court of Tasmania had granted an interlocutory injunction that restrained the ABC from broadcasting the footage.

In the High Court the ABC successfully sought an order discharging the interlocutory injunction. Lenah’s defence was unsuccessful because it had “misplaced” its reliance on an “emergent tort of invasion of privacy”.<sup>59</sup> In short, the farm surveillance could not constitute an invasion of privacy because that cause of action is not recognised by Australian law.

Nor could the equitable doctrine of breach of confidence assist Lenah, it having been conceded by the parties that “information about the nature of the processing is not confidential, and was not imparted in confidence”.<sup>60</sup> As Gleeson CJ said:

The problem for [Lena] is that the activities secretly observed and filmed were not relevantly private. ... a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private.<sup>61</sup>

*Lenah* was applied to the same effect by the Supreme Court of NSW in *Windridge Farm*.<sup>62</sup> As Hall J said, “[o]n the facts of the matter, no basis exists for breach of confidence by the defendants”.<sup>63</sup>

## 4. Reviews of privacy law

Both the NSW and Australian Law Reform Commissions have recommended introducing a statutory cause of action for invasion of privacy.<sup>64</sup> In its 2014 report, the Australian Law Reform Commission also recommended that surveillance devices legislation should be technology neutral.<sup>65</sup> It stated that in addition to recognising existing types of surveillance devices, the legislation should also recognise emerging technologies; and it noted that four technologies in particular (including drones) had generated some degree of community concern.<sup>66</sup> The

Legislative Council's Standing Committee on Law and Justice is currently conducting an inquiry into remedies for the serious invasion of privacy.<sup>67</sup>

## **5. NSW Farm Trespass Policy**

In December 2014, the Minister for Primary Industries, Katrina Hodgkinson, released the [NSW Farm Trespass Policy](#).<sup>68</sup> It states:

...People that illegally enter farms present a major biosecurity risk to our \$12 billion primary industries sector.

Not only does trespassing on farms potentially spread devastating diseases, it disrupts vital business practices and can distress, injure or even kill animals, causing widespread production losses.<sup>69</sup>

The Policy includes the following measures:

- Strict penalties, under the new NSW Biosecurity Act, to support the prosecution of and significant criminal penalties for people who deliberately and knowingly create biosecurity risks.
- A community awareness campaign to provide vital education to the public about the economic, biosecurity and animal welfare implications of on-farm trespassing, as well as raising awareness of lawful, necessary animal husbandry practices.
- Proactive and preventative security strategies will be developed with industry to further improve the biosecurity regimes by deterring trespassers through owner-initiated surveillance cameras, signage and fencing.
- Compliance and enforcement operations, run in conjunction with NSW Police, to target high risk farms and respond to intelligence.
- Existing trespassing laws will be supported by new prosecution guidelines, to crack down on farm trespass, nuisance and surveillance offences.<sup>70</sup>

This policy, and the issue generally, was discussed at a meeting of Primary Industries Ministers from Australian jurisdictions and New Zealand on 22 May 2015. The Ministers agreed that:

... the NSW Farm Incursions Policy be used as a useful reference to address farm trespass issues. There was agreement that a consistent approach to farm trespass was important in maintaining the integrity of the biosecurity system and ensuring farmers were offered the same entitlements to privacy as the broader community.<sup>71</sup>

On 3 August 2015, the NSW Minister for Primary Industries, Niall Blair, and the Federal Minister for Agriculture, Barnaby Joyce, jointly hosted a roundtable discussion on farm trespass.<sup>72</sup>

## **6. NSW Biosecurity Bill 2015**

### **6.1 The Biosecurity Bill**

To give effect to its [NSW Biosecurity Strategy 2013—2021](#) and the [Intergovernmental Agreement on Biosecurity](#), the NSW Government introduced the *Biosecurity Bill 2014* into the Legislative Assembly on 23 October 2014. That Bill lapsed on prorogation on 2 March 2015. On 11

August 2015 the Government effectively re-introduced the Bill into the Legislative Council as the [Biosecurity Bill 2015](#).<sup>73</sup>

As stated in cl 3, the primary objective of the *Biosecurity Bill 2015*, which will wholly or partly replace 14 pieces of existing legislation, is to:

Provide a framework for the prevention, elimination and minimisation of biosecurity risks posed by biosecurity matter, dealing with biosecurity matter, carriers and potential carriers, and other activities that involve biosecurity matter, carriers or potential carriers.

Prior to the introduction of the Bill, Niall Blair MLC, Minister for Primary Industries and Minister for Lands and Water, referred to the intended use of the Bill to prosecute farm trespass when he said:

This week I will introduce a new biosecurity bill that will provide strict new penalties for anyone who intentionally or recklessly breaches their biosecurity obligation. Biosecurity is a shared responsibility. This means that everyone has a role to play in protecting our State from plant and animal pests and diseases. Farm animal welfare is a key concern for our producers and the Government has a strong and well-established legislative framework, supported enforcement agencies and rigorous procedures to respond to cases of animal cruelty. Equally, the Government is committed to ensuring that farmers who treat their animals in a lawful and responsible manner are permitted to carry out their business undisturbed by the unlawful actions of animal activists.

The financial and personal impact of the publicity attracted by raids carried out by animal activist organisations on individuals, enterprises and industries more broadly is rarely documented or understood by the community. Our farmers are suffering as a result of unlawful farm trespass—financially, emotionally and physically. Aside from the intolerable biosecurity risk farm trespass creates, it is also an unjust invasion of the privacy of farmers carrying out lawful animal husbandry practices. Together we are united in this fight: producers, industry associations, individual farmers, animal welfare enforcement agencies, police and the Government.<sup>74</sup>

## **6.2 Offence of failing to discharge a biosecurity duty**

A broad biosecurity duty is created by cl 22, which states:

Any person who deals with biosecurity matter or a carrier and who knows, or ought reasonably to know, the biosecurity risk posed or likely to be posed by the biosecurity matter, carrier or dealing has a biosecurity duty to ensure that, so far as is reasonably practicable, the biosecurity risk is prevented, eliminated or minimised.<sup>75</sup>

Failure to discharge that duty will become a new offence. Clause 23(1) provides, “a person who fails to discharge the person’s biosecurity duty” is guilty of an offence.

If the failure was intentional or reckless, and caused or was likely to cause a significant “biosecurity impact”<sup>76</sup>, it is a category 1 offence<sup>77</sup> that, in the case of an individual, carries a maximum penalty of \$1,100,000 and/or 3 years imprisonment.<sup>78</sup> In any other case, the offence is a category 2 offence<sup>79</sup> that carries, in the case of an individual, a maximum penalty of \$220,000<sup>80</sup> (or \$1,100,000 if the offence is committed negligently by an individual).<sup>81</sup>

Under this proposed legislation, those entering unauthorised upon farm property, including animal welfare activists and all their possessions, become “carriers” of “biosecurity matter”. The trespassing and surveillance become “dealing” or “engaging in a dealing”, as well as a “biosecurity risk posed or likely to be posed”.

The practical effect of the *Biosecurity Bill 2015* was outlined by Minister Blair, who stated in the Second Reading Speech:

In practical terms, ... where a property has been signposted advising of any sanitary applications or other actions that must be taken before entry, any person entering that property will be on notice about what they need to do to discharge their biosecurity duty and may be prosecuted under the Act if they fail to do so. Let me be clear. Compliance action will be taken in relation to the biosecurity risk that has arisen or may arise due to a person not complying with the biosecurity requirements of that property, regardless of the purpose of that entry.<sup>82</sup>

### **6.3 Comments by other political parties**

In October 2014, Shooters and Fishers Party MLC Robert Brown spoke in Parliament about “efforts earlier this year by animal activists to unfairly and unjustly attack farmers”.<sup>83</sup> He quoted from a letter written by Mr Bill Farmer in response to an opinion piece in the *Sydney Morning Herald*:

I think Mr Farmer has put a great case—just think about live cattle exports. In concluding he said:

The rule of law says it is for the appropriate authorities to determine whether crimes, felonies or misdemeanours have been committed—not self-appointed vigilante activists committing trespass and trampling on the rights of people who might be completely innocent.

I say that if the New South Wales Government wants to bring in laws that such vigilantes, or lawbreakers, seem upset by, the sooner the better.<sup>84</sup>

In a December 2014 media release, Greens NSW MLC Dr Faruqi stated:

...The proposed biosecurity bill will be 'Ag-Gag' in disguise.

Ag-gag laws, such as the ones proposed by the Minister, seek to silence animal welfare activists and have backfired around the world, on consumers and on the industry itself.

In the absence of any serious monitoring of animal welfare outcomes in factory farming by the Government, animal welfare activists have been filling the void.

Animal welfare activists should and overwhelmingly do meet biosecurity expectations and shouldn't be specifically targeted as foreshadowed by the Government.

The Government should be in the business of helping to improve animal welfare outcomes by working with industry to introduce enhanced standards, not trying to avoid scrutiny and criminalising those that expose animal mistreatment...<sup>85</sup>

According to a recent media report, Dr Faruqi said “she would be seeking amendments ‘to make sure activists in no way are silenced’”.<sup>86</sup> The same article noted the comment by Animal Justice MLC Mark Pearson that the

new Bill “is likely allow activists to carry out their work if they show they aren’t reckless and observe strict biosecurity protocols such as disinfecting footwear.”<sup>87</sup> Mr Pearson, former Executive Director of Animal Liberation, reportedly said “he had trained activists collecting video evidence to also film themselves taking biosecurity precautions”.

## 7. Queensland Biosecurity Act

In 2014 the Queensland Parliament enacted the *Biosecurity Act 2014 (Qld)*, which is similar in scope to the Bill presently being considered by the NSW Parliament. The Act was described in the following terms by John McVeigh, Minister for Agriculture, Fisheries and Forestry:

We are committed to doubling farm production in Queensland by 2040. But to deliver this, we must address the challenges from new and re-emerging pests and diseases. Due to our geographical location, our tropical climate and numerous ports, Queensland is at the front line of biosecurity pest and disease concerns for Australia. Maintaining confidence in our biosecurity systems is vital for ensuring access to global markets and developing new opportunities for our world-class farm products.<sup>88</sup>

**Offence:** The counterpart to cl 23(1) of the *Biosecurity Bill 2015* is s 24(1) of the *Biosecurity Act 2014 (QLD)*. Like cl 23(1), s 24(1) creates an offence not in respect of a positive action, but in respect of an omission, the omission being not discharging a “general biosecurity obligation” that “must” be discharged.

Two forms of the offence are created, a simple form and an aggravated form. If the offence is not aggravated, it is a defence for the person to show that they had a “reasonable excuse for failing to discharge the obligation”.<sup>89</sup>

As provided by s 27, an offence is an aggravated offence if it causes significant damage, or is likely to cause significant damage, to the health and safety of people, to the economy or to the environment. Further, the prosecution must prove that the person who committed the offence intended such an outcome or was reckless as to whether there would be such an outcome.<sup>90</sup>

**Maximum penalties:** The maximum penalties for both the simple and aggravated forms of the biosecurity obligation offence are set out in s 24(1):

- (a) if the offence is an aggravated offence—3000 penalty units<sup>91</sup> (\$330,000) or 3 years imprisonment; or
- (b) if the offence is not an aggravated offence—
  - (i) for a breach in relation to prohibited matter—1000 penalty units (\$110,000) or 1 year’s imprisonment; or
  - (ii) for a breach in relation to restricted matter—750 penalty units (\$82,500) or 6 months imprisonment; or
  - (iii) otherwise—500 (\$55,000) penalty units.

Section 19 defines “prohibited matter” to be “biosecurity matter that, for the time being, is established as prohibited matter under chapter 2”. Section 21(1) defines “restricted matter” to be “biosecurity matter that, for the time being, is established as restricted matter under chapter 2.”

## **8. Federal Private Member's Bill**

On 11 February 2015, Chris Back introduced into the Commonwealth Senate a Private Member's Bill entitled [Criminal Code Amendment \(Animal Protection\) Bill 2015](#). The Bill, which appears to be modelled on legislation enacted in some jurisdictions in the United States, would insert new offences into the Commonwealth Criminal Code including:

- *Failing to report malicious cruelty to animals after recording it:* if a person makes a visual record of an activity which is believed to be malicious cruelty to animals, the person must report the activity to a relevant authority within one business day; and the person must give the record to the authority within five business days. Failure to do so is an offence with a maximum penalty of a fine of \$5,400.
- *Destroying or damaging property relating to an animal enterprise:* It is an offence for a person to engage in conduct that destroys or damages property used in carrying on an animal enterprise, or belonging to a person who carries on an animal enterprise or who is related to an animal enterprise, if the first person intends the conduct to interfere with the carrying on of an animal enterprise. The penalties vary according to the amount of economic damage and the degree of bodily injury to any individual (if any); there are five grades of offence with the following maximum penalties:
  - 1 year imprisonment (economic damage less than \$10,000; and no substantial bodily injury),
  - 5 years imprisonment (economic damage exceeding \$10,000 and no substantial bodily injury),
  - 10 years imprisonment (economic damage exceeding \$100,000 or substantial bodily injury),
  - 20 years imprisonment (economic damage exceeding \$1 million or serious bodily injury), and
  - life imprisonment (if the conduct results in death).
- *Causing fear of death or serious bodily injury to a person who is related to an animal enterprise:* It is an offence for a person to engage in conduct involving threats, vandalism, property damage, criminal trespass, harassment, or intimidation if (i) the conduct causes another person reasonably to fear that any person will cause death or serious bodily injury to a person who carries on, or is related to, an animal enterprise, and (ii) the first person intends that the conduct will interfere with the carrying on of the animal enterprise. The same five grades of maximum penalties apply.

The Commonwealth Parliament does not have general legislative power in relation to criminal law and the proposed offences are based upon, and therefore limited in scope by, the Parliament's legislative powers in relation to corporations; trade and commerce with other countries and among the States; and telecommunication services.

On 12 June 2015, the Senate Rural and Regional Affairs and Transport Legislation Committee published a [report](#) on the Bill, recommending that it be enacted subject to one qualification.<sup>92</sup> The report concluded:

3.33 The committee acknowledges that a significant number of the submissions to this inquiry questioned both the intention and the likely operation of the bill in regard to animal cruelty. In particular, the committee notes the views expressed by those who argued that the proposed legislation would unfairly target those who seek to uncover animal cruelty, such as whistleblowers (including abattoir, farm and factory workers), undercover investigators and investigative journalists.

3.34 Whilst the committee acknowledges these views, it also notes that the bill does not remove or limit the ability for people to report animal cruelty, nor does it preclude any individual from lawfully pursuing a specific case of ongoing and/or systematic animal cruelty.

3.35 The committee does note, however, the argument raised by some submitters about the prescriptive nature of the timeframe for reporting. The committee acknowledges that, particularly in the case of remote locations, reporting within one business day may not be practical or possible. The committee therefore suggests that the time frame for reporting be less prescriptive.<sup>93</sup>

Labor senators issued a [dissenting report](#), which called on the Government to “facilitate a proper consultative process to address each concern expressed in the committee's report with the aim of providing a way forward for all stakeholders involved”.<sup>94</sup> The Australian Greens also issued a [dissenting report](#), stating (in part):

The Australian Greens fully reject any attempts to minimise and remove mechanisms that would increase transparency and accountability...

The [Bill] seeks to deter and punish those who would expose to the public visual evidence of animal cruelty in commercial animal industries. It would do this by effectively criminalising investigators while turning a blind eye to the perpetrators of that cruelty.

Indeed, the bill would result in greater penalties being imposed on those who make visual records of animal cruelty, than those who would commit the cruelty which remains an illegal act.<sup>95</sup>

In June 2015, the Greens introduced into the Senate the [Voice for Animals \(Independent Office of Animal Welfare\) Bill 2015](#), which provides for the establishment of a statutory authority with responsibility for advising upon the protection of animal welfare in Commonwealth regulated activities”.<sup>96</sup>

## 9. Conclusion

In the current debate about farm trespass and surveillance, concerns of farmers about the inadequacy of existing legal remedies for invasion of property and privacy rights and breaches of biosecurity safeguards are competing against concerns expressed by animal welfare organisations about failings of the current system for enforcing animal protection laws. The NSW Government has introduced a Farm Trespass Policy and the Biosecurity Bill 2015, which creates a new offence of failing to discharge a biosecurity duty, with a maximum penalty of 3 years imprisonment and/or a fine of \$1.1 million. While proponents of these laws see them as farm protection laws, critics refer to them as “Ag-gag” laws on the basis that they are aimed at silencing animal welfare activists.

- <sup>1</sup> See for example, C Bettles, [Plea for privacy protection](#), *The Land*, 20 June 2013; ABC Landline, [Sky Wars](#), 2 September 2013.
- <sup>2</sup> See for example, Voiceless, [Submission to the Senate Rural and Regional Affairs and Transport Legislation Committee: Criminal Code Amendment \(Animal Protection\) Bill 2015](#), 10 March 2015, Appendix 1; and S O'Sullivan, [Gagging debate won't right this wrong](#), *Sydney Morning Herald*, 24 August 2015
- <sup>3</sup> See for example S Layne, 'Ag-Gag: The Need for Compromise in the Food Industry' (2015) 4 *British Journal of American Legislative Studies* 473.
- <sup>4</sup> NSW Farmers, [NSW Farmers calls for government to stand up to activists](#), *Media Release*, 14 June 2013.
- <sup>5</sup> National Farmers Federation, [Submission to the Australian Law Reform Commission 'Serious Invasion of Privacy in the Digital Era'](#), December 2013, p13.
- <sup>6</sup> National Farmers Federation, note 5, p15.
- <sup>7</sup> Australian Pork Limited, [Submission in relation to Competition Policy Review Draft Report](#), November 2014, p2.
- <sup>8</sup> Australian Pork Limited, note 7, p2-3
- <sup>9</sup> Australian Lot Feeders Association, [Response to the Australian Law Reform Commission inquiry into Serious Invasions of Privacy In the Digital era](#), November 2013, p2
- <sup>10</sup> Australian Lot Feeders Association, note 9, p2.
- <sup>11</sup> Voiceless and Barristers Animal Welfare Panel, [Joint Submission on the ALRC's review on 'Serious invasions of privacy in the digital era'](#), December 2013, p5.
- <sup>12</sup> Voiceless and Barristers Animal Welfare Panel, note 11, p4
- <sup>13</sup> Voiceless and Barristers Animal Welfare Panel, note 11, p5-6
- <sup>14</sup> Voiceless et al, [Submission on the Framework for a NSW Biosecurity Act](#), June 2014
- <sup>15</sup> RSPCA Australia, ['Ag gag' laws in Australia?](#), Discussion Paper, 2013
- <sup>16</sup> RSPCA Australia, [Submission to Serious Invasions of Privacy in the Digital Era Issues Paper](#), June 2014, p1-2
- <sup>17</sup> *Prevention of Cruelty to Animals Act 1979*, s 3
- <sup>18</sup> *Prevention of Cruelty to Animals Act 1979*, ss 5 and 6, respectively. See also the other offences in Part 2 of the Act.
- <sup>19</sup> *Prevention of Cruelty to Animals Act 1979*, s 4(2)
- <sup>20</sup> *Prevention of Cruelty to Animals Act 1979*, s 4(3)
- <sup>21</sup> *Prevention of Cruelty to Animals Act 1979*, s 24
- <sup>22</sup> *Prevention of Cruelty to Animals Act 1979*, s 24(1)(b)(ii).
- <sup>23</sup> *Prevention of Cruelty to Animals Regulation 2012*, cl 26(3)(i).
- <sup>24</sup> D Cao, K Sharman and S White, *Animal Law in Australia* (2<sup>nd</sup> ed), 2015, Lawbook Co, Sydney, p 222.
- <sup>25</sup> NSWPD, [Second Reading Speech](#), 29 November 2007, p 4686.
- <sup>26</sup> *Prevention of Cruelty to Animals Act 1979*, ss 24E(2), 24F; D Cao, K Sharman and S White, *Animal Law in Australia* (2<sup>nd</sup> ed), 2015, Lawbook Co, Sydney, p 226.
- <sup>27</sup> *Prevention of Cruelty to Animals Act 1979*, s 24G. D Cao, K Sharman and S White, *Animal Law in Australia* (2<sup>nd</sup> ed), 2015, Lawbook Co, Sydney, p 226.
- <sup>28</sup> D Cao, K Sharman and S White, *Animal Law in Australia* (2<sup>nd</sup> ed), 2015, Lawbook Co, Sydney, p 225.
- <sup>29</sup> *DPP (NSW) v Strang* (2011) 209 A Crim R 480 at [40]–[41]; referring to *In the Appeal of Thompson* (1950) WN (NSW) 183; *Press v Tuckwell* (1968) 69 SR(NSW) 17 at 19.
- <sup>30</sup> Long title to the *Inclosed Lands Protection Act 1901*; *DPP (NSW) v Strang* (2011) 209 A Crim R 480 at [40].
- <sup>31</sup> *DPP (NSW) v Strang* (2011) 209 A Crim R 480 at [43]–[47]; *Inclosed Lands Protection (Summary Offences) Amendment Act 1979*.
- <sup>32</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era (DP 80)*, 2014, Sydney, at 3.33. As the Commission point out at 3.35, trespass to land requires an element of physical interference, so will not apply to a person who remains outside the land in question to conduct surveillance.
- <sup>33</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era (DP 80)*, 2014, Sydney, at 3.33
- <sup>34</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era (DP 80)*, 2014, Sydney, at 3.34 (footnotes omitted)
- <sup>35</sup> [2011] NSWSC 196

- 36 [2011] NSWSC 196 at [7]  
 37 [2011] NSWSC 196 at [72]–[76]  
 38 [2011] NSWSC 196 at [57]–[59]  
 39 [2011] NSWSC 196 at [170]  
 40 [2011] NSWSC 196 at [170]  
 41 [2011] NSWSC 196 at [43]  
 42 [2011] NSWSC 196 at [146]  
 43 [2011] NSWSC 196 at [147]–[148] and [161]; *TCN Channel 9 Pty Ltd v Anning* (2002) 54 NSWLR 333  
 44 [2011] NSWSC 196 at [160]  
 45 [2011] NSWSC 196 at [161]  
 46 [2011] NSWSC 196 at [198]  
 47 [2011] NSWSC 196 at [162]–[176]  
 48 [2011] NSWSC 196 at [173]  
 49 [2011] NSWSC 196 at [176]  
 50 D Butler, [The Dawn of the Age of the Drones: An Australian Privacy Law Perspective](#) (2014) 37(2) UNSWLJ 434.  
 51 Section 4(1) further provides that the land, building or place constitutes premises “whether in or outside this jurisdiction”.  
 52 D Butler, [The Dawn of the Age of the Drones: An Australian Privacy Law Perspective](#) (2014) 37(2) UNSWLJ 434.  
 53 Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era](#) (Report 123), 2014, Sydney, p 48 at [3.39]; citing R Balkin and J Davis, *Law of Torts* (5<sup>th</sup> ed), 2013, LexisNexis Butterworths, Sydney, Ch 14; *Raciti v Hughes* (1995) 7 BPR 14 837; *Hunter and Others v Canary Wharf Ltd, Hunter and Others v London Docklands Corporation* [1997] AC 655; and *Oldham v Lawson (No 1)* [1976] VR 654.  
 54 Supreme Court of NSW (Equity Division), 19 October 1995, per Young J; (1995) 7 BPR 14,837  
 55 (1995) 7 BPR 14 837 at 14,840.  
 56 (1995) 7 BPR 14 837 at 14,841.  
 57 [2001] HCA 63.  
 58 [2001] HCA 63 at [66].  
 59 [2001] HCA 63 at [132] per Gummow and Hayne JJ, Gaudron J agreeing.  
 60 [2001] HCA 63 at [30] per Gleeson CJ.  
 61 [2001] HCA 63 at [43].  
 62 [2011] NSWSC 196.  
 63 [2011] NSWSC 196.  
 64 NSW Law Reform Commission, [Invasion of Privacy](#), Report 120, 2009, Sydney, p 3. Australian Law Reform Commission, [For Your Information: Australian Privacy Law and Practice](#), Report 108, 2008, Canberra, Recommendation 74–1; Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era](#), Report 123, 2014, Canberra, Recommendation 4–1.  
 65 Australian Law Reform Commission, note 64, p282 (Rec 14-2)  
 66 Australian Law Reform Commission, note 64, p283  
 67 Standing Committee on Law and Justice, [Remedies for the serious invasion of privacy in New South Wales \(inquiry\)](#), [online]  
 68 K Hodgkinson, [New measures to protect farmers](#), *Media Release*, 9 December 2014  
 69 K Hodgkinson, note 68, attachment to media release  
 70 K Hodgkinson, note 68, attachment to media release  
 71 Department of Agriculture, [Agriculture Minister's Forum](#), *Communique*, 25 May 2015  
 72 N Blair and B Joyce, [National focus on farm trespass](#), *Media Release*, 3 August 2015  
 73 N Blair, [Biosecurity Bill to Protect the State's \\$12 Billion Primary Industries Sector](#), *Media Release*, 12 August 2015; see also NSW Department of Primary Industries, [FAQs—Framework for Protecting NSW — NSW Biosecurity Act](#).  
 74 [NSWPD, 11 August 2015, p 19 \(N Blair\)](#).  
 75 Key definitions are: “**Biosecurity matter**” is defined in cl 10 to include: “any living thing, other than a human”, “a disease”, “a prion”, “a contaminant”, or “disease agent”. The definition can also be expanded under cl 10(h) to include “anything declared by the regulations to be a biosecurity matter”. “**Carrier**” is defined in cl 11 to mean: “any thing (whether alive, dead or inanimate, and including a human) that has, or is capable of

having, any biosecurity matter on it, attached to it or contained in it”. “Deal” or “engage in a dealing” is defined by cl 12(1) to include: having custody or control of a biosecurity matter or carrier; moving biosecurity matter or a carrier; using biosecurity matter or a carrier for any purpose; causing or permitting such a dealing to occur; agreeing to deal with biosecurity matter or a carrier; and entering into an agreement under which another person has such a dealing. As provided by cl 12(1)(p), the definition of “deal” or “engaging in a dealing” may be expanded to include “anything prescribed by the regulations”. “Reasonably practical” is defined in cl 16 to mean “reasonably able to be done”, taking into account such matters as “what the person concerned knows, or ought reasonably to know, about the biosecurity risk and the ways of preventing, eliminating or minimising the risk”. “Biosecurity risk” is defined in cl 14 to mean “the risk of a biosecurity impact occurring”. “Biosecurity impact” is defined in cl 13 to mean an adverse effect on the economy, the environment or the community that arises, or has the potential to arise, from biosecurity matter, a carrier or dealing with biosecurity matter or carrier. An “adverse effect” specifically includes “the introduction, presence, spread or increase of a disease or disease agent into or within the State or any part of the State”.

<sup>76</sup> *Biosecurity Bill 2015*, cl 13(1) defines “biosecurity impact” (see note 75)

<sup>77</sup> *Biosecurity Bill 2015*, cl 23(2)

<sup>78</sup> *Biosecurity Bill 2015*, cl 276(a). In the case of a continuing offence, there is a further penalty of \$137,500 for each day the offence continues.

<sup>79</sup> *Biosecurity Bill 2015*, cl 23(3)

<sup>80</sup> *Biosecurity Bill 2015*, cl 277(1)(a). In the case of a continuing offence, a further penalty of \$55,000 for each day the offence continues.

<sup>81</sup> *Biosecurity Bill 2015*, cl 277(2)(a). In the case of a continuing offence, a further penalty of \$137,500 for each day the offence continues.

<sup>82</sup> [NSWPD \(Proof\) 12 August 2015, p 40 \(N Blair\)](#).

<sup>83</sup> R Brown, [NSWPD, 15 October 2014, p1137](#)

<sup>84</sup> R Brown, note 83, p1137

<sup>85</sup> M Faruqi, [NSW Government to introduce Ag-gag by stealth under guise of biosecurity, Media Release](#), 10 December 2014. See also [NSWPD](#), 19 June 2014, p 29,894

<sup>86</sup> K Needham, [Biosecurity law sets hurdle for animal activists documenting cruelty](#), *Sydney Morning Herald*, 23 August 2015

<sup>87</sup> K Needham, note 86

<sup>88</sup> Media Statement: [New Biosecurity Act to better protect Queensland](#), 6 March 2014

<sup>89</sup> *Biosecurity Act 2014 (QLD)*, s 24(2)

<sup>90</sup> *Biosecurity Act 2014 (QLD)*, s 27(2)

<sup>91</sup> A penalty unit is equal to \$110: s 5(1)(e)(ii) *Penalties and Sentences Act 1992* (Qld)

<sup>92</sup> Senate Rural and Regional Affairs and Transport Legislation Committee, [Criminal Code Amendment \(Animal Protection\) Bill 2015](#), 12 June 2015, p19-20

<sup>93</sup> Rural and Regional Affairs and Transport Legislation Committee, note 91, p19-20

<sup>94</sup> Rural and Regional Affairs and Transport Legislation Committee, [Labor Senators Dissenting Report: Criminal Code Amendment \(Animal Protection\) Bill 2015](#), 12 June 2015

<sup>95</sup> Senate Rural and Regional Affairs and Transport Legislation Committee, note 91, p21

<sup>96</sup> Commonwealth Parliament, [Voice for Animals \(Independent Office of Animal Welfare\) Bill 2015: Explanatory Memorandum](#), p1

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