Review of the *Primary Industry Activities Protection Act 1995*

FINAL REPORT

AgriGrowth Tasmania
Department of Primary Industries, Parks, Water and Environment

Tasmanian Government

Contents

Introduction

BACKGROUND

The *Primary Industry Activities Protection Act 1995* ('the Act') prevents primary producers from being sued under the common law action of nuisance in respect of certain activities that are incidental to efficient and commercially viable primary production. It has been law in Tasmania for almost twenty years.

The Tasmanian Government recognises that agriculture is a key strength in the State's economy and is committed to growing the value of the agricultural sector tenfold to $10 billion per year by 2050.

As part of the Government's AgriVision 2050 Plan, the Government committed to a review of the Act to strengthen the legal position of farmers, allowing them to respond to the food security challenge and get on with what they do best.

The Hon Jeremy Rockliff MP, Deputy Premier and Minister for Primary Industries and Water, accordingly directed the Department of Primary Industries, Parks, Water and Environment (DPIPWE) to undertake a review of the Act.

TERMS OF REFERENCE

Minister Rockliff asked DPIPWE to report against the following terms of reference:

1. The effectiveness of the Act in meeting the objective to protect persons engaged in primary industry by limiting the operation of the common law of nuisance in respect of certain activities that are incidental to efficient and commercially viable primary production.
2. Whether changes are required to the Act to strengthen the legal position of farmers.
3. Any other relevant matters.

CONSULTATION PROCESS

The public and stakeholders were informed through the following communication methods that the Review was underway:

- Minister Rockliff issued a media release launching the Review on 19 June 2014.
- Advertisements were included in the *Tasmanian Country* newspaper on 20 June 2014, and in the three Tasmanian metropolitan papers on 21 June 2014.
- An extensive mail out was undertaken to inform key organisations and individuals about the Review, and to invite them to make a submission.
- Briefings were offered to key stakeholder groups by the project team, and four such briefings were delivered.

Submissions were open until 4 August 2014. However, following requests from a number of stakeholders, submissions were accepted until mid-August.

SUBMISSIONS RECEIVED

Sixteen (16) written submissions to the Review were received:

- Seven (7) from peak bodies in agriculture/forestry;
- Four (4) from individuals;
- Two (2) from agricultural businesses;
- Two (2) from parties associated with local government; and
- One (1) from a community environmental law centre.

A complete list of submitters is included as Appendix 1.

Key Findings

OVERVIEW

The legislation that this Review examined, the *Primary Industry Activities Protection Act 1995* (the Act), is based on legislation from the United States of America (USA), where law suits in the 1970's and 1980's from non-farming neighbours had been used to restrict (or stop) farmers from undertaking their usual activities. 'Right to farm' legislation was developed in response, and it has taken a number of forms.

The most common 'right to farm' legislation is what will be henceforth referred to in this report as 'nuisance shield' protection. It is legislation that restricts the rights of neighbours to take action against primary producers under the common law of nuisance, and it is the basis of the Tasmanian Act.

In the USA, nuisance shield laws appear to be utilised frequently, but the validity of laws that restrict or remove common law rights has also been successfully challenged in at least one jurisdiction.

As this Review demonstrates, there is far less evidence on which to make any definitive assessments of the Tasmanian Act.

If a narrow view is taken, the Act has been effective in meeting its stated purpose, which is 'to protect persons engaged in primary industry by limiting the operation of the common law of nuisance in respect of certain activities that are incidental to efficient and commercially viable primary production'. It has also been very uncontroversial in comparison to its legislative 'ancestors' in the USA.

However, as one submission noted, the Act does not 'extend very far into the world of disputes about farming practices' (No. 7). Many submissions therefore sought instead to discuss a number of much broader and inter-related issues. Those issues can be summarised as:

- whether there is (or should be) a 'right to farm';
- the appropriate protection of prime agricultural land; and
- options to reduce land use conflict.

These broader issues are discussed in more detail in Section 3.

The general conclusions from this Review process are:

- 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.

SUPPORT FOR THE ACT

The question of whether the Act continues to be necessary was not specifically put to stakeholders in the Issues Paper.

However, the majority of submissions that offered a comment were either fully or conditionally supportive of the Act (Submissions 2, 5, 7, 11, 14 and 16).

Two submissions argued that the Act has failed (No. 13) or has been ineffective (Nos. 12 & 13). No evidence to support those assertions was provided.

One submission argued that the need for the Act was never adequately established in the first place, and continues to be questionable (No.10). This submission was strongly of the view that nuisance shield legislation is not the appropriate mechanism to resolve land use conflict, as it fails to acknowledge the legitimate rights of other residents and does not encourage long-term dispute resolution.

The Review demonstrates that, on balance, the Act has support in the stakeholder community, and no substantive evidence was provided that it has had an undue detrimental impact on non-farming landholders.

Furthermore, the Act does not involve legislative burden or 'red tape'. It imposes no obligations whatsoever on individuals or businesses, and requires no active administration by the Department of Primary Industries, Parks, Water and Environment (DPIPWE) or other agency of the Tasmanian Government.

SECTION 1: EFFECTIVENESS OF THE ACT

Terms of Reference

1. The effectiveness of the Act in meeting the objective to protect persons engaged in primary industry by limiting the operation of the common law of nuisance in respect of certain activities that are incidental to efficient and commercially viable primary production.

Neither the submissions nor background research revealed any cases (successful or otherwise) of nuisance brought against a farmer in Tasmania since 1995, when the Act was initially introduced. Strictly speaking, the Act has therefore been entirely effectively, and several submissions did note that the fact that the Act may have thwarted a number of litigious claims should not be underestimated.

One of the few cases in which the Act was cited was identified in the EDO Submission (No. 10), in the Resource Management and Planning Appeal Tribunal. The applicant was a landholder seeking permission to subdivide his property. The case put forward was that the new residents the landholder was seeking to introduce into the locality would not be able to complain about nearby farming activity, because the Act curtailed their ability to do so. This use of the Act was arguably not what the legislators had in mind, and it was pleasing to note that this attempt to pervert the intention of the Act failed.

Despite the lack of case law on the Act itself, conflict between neighbours about farming practices clearly does occur in Tasmania. The EDO submission (No. 10) noted that the organisation has been contacted on numerous occasions by landholders affected by primary industries. Several specific incidences were also raised with the Project Team during consultations with peak bodies.

DPIPWE officials have also reported previous contact by landholders aggrieved by the practices of their farming neighbours. The existence of the Act was cited in response to those parties, which could lend weight to the argument that the mere existence of the Act may have thwarted a number of litigious claims.

There were various suggestions in the submissions as to why remedies available under the common law of nuisance are rarely pursued:

- people tend to use the cheapest and easiest way to resolve their issues;
- the costs and risks of litigation deters potential litigants;

- concepts of private nuisance have been overtaken by planning, environmental and laws relating to local government matters; and/or
- local councils tend to be first point of call for land use disputes, which are subsequently resolved through mediation.

The fact that no other Australian state or territory has introduced nuisance shield legislation may suggest nuisance suits against primary producers have not become a particular problem in other Australian jurisdictions. However, with the most regional and dispersed population of any state in Australia, Tasmania would have the highest proportion of its population living in close proximity to commercial farms, and therefore a higher risk of conflict.

It is also important to note that, due to the specific development of the common law of private nuisance in Australia, farmers remain vulnerable.

Common law (also known as case law or precedent) is law developed by judges through decisions of courts that decide individual cases, as opposed to statutes adopted through the legislative process or regulations issued by the executive branch.

Australian common law has tended to develop along similar lines to the United Kingdom (UK), whereas common law in the USA has often evolved differently.

Interference with a person's use and enjoyment of his or her land can give rise to a common law action of 'private nuisance'. The law recognizes that landowners, or those in rightful possession of land, have the right to reasonable comfort and convenience.

Under common law in Australia, it is not a defence to a claim of private nuisance that the activity existed before the new owner arrived, and that the plaintiff therefore 'came to the nuisance'. In the USA, 'coming to the nuisance' is a defence. Farmers in the USA would therefore have a better chance of successfully defending a claim of nuisance from a newly arrived neighbour than an Australian farmer.

However, the USA has a rate of civil litigation almost three times higher than the United Kingdom (no direct comparison with Australia is available). In Australia and in the UK, losers in civil suits have to pay a substantial proportion of the winner's legal fees. In the USA, each party pays their own fees, regardless of the outcome. There is therefore less risk to potential plaintiffs in the USA, which has arguably resulted in higher rates of litigation.

The literature suggests that farmers in the USA often successfully defended nuisance suits, but the high costs (financial and otherwise) of defending an action were alone often

sufficient to undermine the viability of a farm. Nuisance shield laws were therefore enacted in the USA to pre-empt the actions altogether.

Therefore, the likelihood that an Australian farmer would be sued by an aggrieved neighbour for nuisance is lower, but due to the inadmissibility of what would otherwise be the most relevant defence, the likelihood that a farmer would lose such an action is higher.

The nuisance shield protection of the Act does ensure Tasmania's primary producers are in a more secure position. This is arguably a sensible measure, given the increased risk of conflict from the State's highly regional and dispersed population.

SECTION 2: CHANGES AND/OR CLARIFICATION NEEDED

Terms of Reference

2. Whether changes are required to the Act to strengthen the legal position of farmers.

The consultation process and the submissions raised a number of questions about the limits and protections of the Act. As no case law has been generated, the Review has had to draw conclusions about the likely interpretation of the legislation.

- *Protection for Corporate Owned Land*

The question of whether corporations were eligible for nuisance shield protection of the Act was raised in one of the briefings delivered by the Project Team.

Section 3(2)(a)(iii) of the Act extends nuisance shield protection if the *owner* or *occupier* (emphasis added) of the land in question 'derives the principal means of his or her livelihood from primary industry'. It would be unlikely for a court to decide that a corporate owner of land has a 'livelihood'.

However, the person having control or management of the land, which would in most cases be a manager assigned by the corporation to oversee the property, would be deemed 'the occupier'. If the manager fulfils the requirements of section 3(2)(a)(iii), the nuisance shield protection would be extended. No change to the Act in this regard is therefore deemed necessary.

- *Lessees of land*

One submission (No. 11) questioned whether land leased for agricultural production was covered by the nuisance shield protection.

If the 'occupier' of the land (in this case, the lessee) fulfils the livelihood requirements of section 3(2)(a)(iii) (as outlined above), the nuisance shield protection would be extended to leased land. No change to the Act in this regard is therefore deemed necessary.

- *Section 3 – definition of* primary industry – *coverage of plantation/native forestry*

Forestry is an important primary industry in Tasmania, both through enterprises that are focused on forestry and those which integrate it as part of a mixed farming business. However, the status of plantation and native forestry under the Act is unclear, and this uncertainty was raised in two of the submissions (Nos. 2 & 5).

Nuisance shield protection would apply to plantation forestry only if 'planting, growing or harvesting crops' was broadly interpreted by a court.

Native forestry has fewer practices in common with traditional cropping activities. It is therefore likely that native forestry activities would not be deemed eligible for the nuisance shield protection under the current definitions of the Act.

A policy decision on the part of the Government would be needed to extend nuisance shield protections of the Act to native forestry, and/or to put the status of plantation forestry under the Act beyond doubt. Extending the protection to either or both forms of forestry could thereafter be achieved by minor additions to the Act's definition of *primary industry*.

The other option the Government may wish to consider is to address nuisance claims against forestry operations by amending the legislation specific to that industry, the *Forest Practices Act 1985*.

- *Section 3 – definition of* primary industry – *coverage of marine farming*

The question of whether the protection in the Act extends to on-water marine farming was raised in one submission (No. 10).

It is likely that on-water marine farming would not be covered under the Act, primarily because the Act relies upon definitions specifically related to 'land'. Extending the Act to marine farming would therefore necessitate complex legislative changes.

Facilities farming marine animals that are land-based would be covered if a court interpreted 'livestock' to include marine animals. ('Livestock' is included in the Act's definition of *primary industry,* but is not itself defined.)

Without evidence that the marine farming industry has suffered any detriment from their apparent omission, there does not appear to be a clear justification for extending the coverage of the Act to water-based marine farming, or for putting the status of land-based facilities beyond doubt.

However, if warranted, again the Government may opt to address this issue directly by amending the legislation specific to the industry, the *Marine Farming Planning Act 1995*.

- *Section 3(2)(a)(iii) – exclusion of small scale or 'hobby' farms*

Section 3(2)(a)(iii) of the Act extends nuisance shield protection only if the owner or occupier of the land in question 'derives the principal means of his or her livelihood from primary industry'. One of the submissions (No. 6) argued that this unfairly excludes small-scale or hobby farmers from utilising the protections of the Act.

The issue of whether small scale or hobby farmers should be entitled to 'right to farm' protection has recently received attention in the US State of Michigan. Michigan's 'right to farm' laws were increasingly used by 'urban farmers', people raising chickens and other livestock for food production on their suburban blocks. The law previously permitted such people to override local government restrictions and complaints from neighbours. Somewhat controversially, Michigan changed its law in May 2014 to confirm the protection is intended only for commercial farms.

Smaller scale or hobby farms are not usually under the same pressures that apply to commercial farms. (For example, it is difficult to conceive of a valid reason for a small scale farm to harvest a crop overnight, as commercial farms are occasionally compelled to do.) They are often located in urban or 'fringe' areas, where residents have a higher expectation of residential amenity and good neighbourly practices should be the predominant concern of all.

It is therefore the conclusion of this review that the Act was intended to protect commercial farms, and extending the protection to non-commercial operations may increase the likelihood of land use conflict, rather than mitigate against it.

However, the Government may wish to consider if the protection should continue to apply only to those who 'derive the principal means of his or her livelihood from primary industry'. The income requirement might inadvertently exclude individuals that own substantial farming operations, but who also have significant off-farm income.

The Australian Tax Office (ATO) has extensive guidance and rulings which seek to determine whether or not an individual is 'carrying on a business of primary production'. The Act could therefore be amended to instead require that the individual is 'carrying on a business of primary production'.

- *Zoning reference in Section 3(2)(a)(i)*

One submission (No. 9) noted that there is minor error in the drafting of the Act. Section 3(2)(a)(i) states that land is in use for primary industry if 'it is zoned by a council for primary industry use'. While councils play a crucial role in planning, councils do not 'zone' land. Planning authorities zone land, and in Tasmania that role is undertaken by the Tasmanian Planning Commission.

It would be advisable to correct this error, but only if more substantive legislative changes are to be pursued.

- *Section 4(c) – improved technology or agricultural practices*

Section 4(c) states that, in order to qualify for protection against a nuisance claim, an activity 'cannot be substantially different to the activities that were or could have been carried out when that continuous period [of primary industry activity] started, unless the difference is attributable to improved technology or practices.'

This element of the legislation was raised in a number of the submissions.

One submission argued that section 4(c) is too broad, and that it could 'potentially allow a significantly wider range of activities to be protected, with significant implications for neighbours' (No. 10).

However, a substantial number of submissions contended that section 4(c) acted as a deterrent to innovation and diversification by farmers.

The Review Team considered section 4(c) carefully, and is of the opinion that it would permit a significant amount of innovation and/or diversification to occur on a property, with no implications to their protection under the Act.

This is good news for farmers, and well aligned with both the original intention of the Act, and the Government's desire to fully encourage ongoing innovation in our agricultural sector.

However, this does raise an important question. The Act does not impede innovation or diversification by primary producers, but many of the submissions believed that it did.

This may be because, despite its brevity, the Act is convoluted in its drafting. An option to improve the drafting is provided in the following section for the consideration of the Government.

POTENTIAL TO SIMPLIFY THE ACT

In addition to the requirement that the individual in question must 'derive the principal means of his or her livelihood from primary industry' (s.3(2)(a)(iii)), the current Act requires that, to qualify for protection against claims of nuisance, the primary industry activity:

- must not contravene or fail to comply with applicable laws (s.3(1) "primary industry activity" (c) & s.6);
- must be on land zoned for primary industry use (s.3(2)(a)(i));
- must be on land regularly used (or prepared for use) for primary industry (s.3(2)(a)(ii));
- must be on land that has been continuously used for primary industry, for longer than one year (s.4(a));
- would not have constituted a nuisance when that continuous period of activity started (s.4(b));
- cannot be substantially different to the activities that were, or might reasonably have been, carried out when that continuous period started, unless the difference is attributable to improved technology or practices (s.4(c));
- is not being improperly or negligently carried out (s.4(d)); AND
- the only ground for claiming the activity is a nuisance is that land use conditions in the locality changed after the land had been in continuous use for primary industry for a period longer than one year (s.4(e)).

As this demonstrates, the Act is arguably repetitive and difficult to follow, as demonstrated by the range of interpretations in the submissions. Simplification of the Act could involve:

1. the deletion of redundant/repetitive requirements;
2. the removal of the 'continuous use' requirement; and/or
3. the deletion of section 4(c).

1. Deletion of redundant/repetitive requirements

- Section 3(2)(a)(ii)

Section 3(2)(a)(ii) requires the area of land to be 'regularly used, or prepared for use, for primary industry'. Section 4(a) also states that a primary industry activity is protected if the land has been used for primary industry for a continuous period longer than one year. If section 4(a) is slightly amended to state the land must be used *or prepared for use* for primary industry, section 3(2)(a)(ii) could be deleted.

- Section 4(e)

Section 4(b) states a primary industry activity is not a nuisance if it did not (or would not have) constituted a nuisance when the farming operation commenced. Section 4(e) states an activity is not a nuisance if the only ground for claiming it is a nuisance is the land use around the activity changed after the farming operation commenced. This essentially states the same requirement in two slightly different ways. As the main purpose of the Act is to ensure that a farm operating when the land use changed around it can continue to function, section 4(b) adequately captures the intent of the Act. Section 4(e) could be deleted without major impact on the operation of the legislation.

2. Removal of the 'continuous use' requirement

The requirement that nuisance shield protection only be given if the use of the land for primary industry is 'continuous' is often included in US 'right to farm' laws, and that is presumably why it was included in the Tasmanian Act as well. (It does not appear to have been specifically mentioned when the Tasmanian Parliament debated the Bill.) The justification appears to be that it provides some balance to laws that may otherwise be considered to be skewed too far in favour of farmers.

However, the justification for the 'continuous use' requirement is questionable. If, for example, the individual who runs a farm is suddenly unable to do so due to ill-health or an accident, it is not unusual for a property to be destocked until the individual has recovered, or new management is secured. Should a neighbour be given the ability to sue for nuisance, simply because the farm was unavoidably out of operation for a period of time?

If the word 'continuous' was removed from section 4, the Act would still require that a farm be in operation for at least one year in order to qualify for protection, but it would not unfairly exclude farms that have experienced a period of dormancy.

3. Deletion of section 4(c) – activities which are substantially different

As discussed above, section 4(c) does permit a significant amount of innovation and/or diversification to occur on a property, with no implications to the protection provided by the Act. This is because protection is extended both if the activity in question 'might reasonably have been carried out' on the property beforehand, and/or if the changed activity is attributable to improved technology or practices.

It would therefore be extremely difficult for a potential plaintiff to rely on section 4(c) to argue that it is a new activity on a farm which nullifies the farmer's nuisance protection under the Act.

The deletion of this condition would therefore have minimal impact on potential plaintiffs, but would correct misperceptions that the Act serves as a barrier to a farmer innovating, diversifying or otherwise improving their operation.

Cumulative Impact of Simplification Proposals

If all proposals above are implemented, the conditions placed on the nuisance shield protection could be reduced from eight to five. Primary industry activity would thereafter be protected from nuisance actions if it:

- does not contravene or fail to comply with applicable laws;
- is on land zoned for primary industry use;
- is on land that has been used, or prepared for regular use, for primary industry, for a period longer than one year;
- did not or would not have constituted a nuisance at the beginning of that period; and
- is not being improperly or negligently carried out.

SECTION 3: OTHER RELEVANT MATTERS

Terms of Reference
3. Any other relevant matters

The questions of whether the PIAP Act has been effective, or could benefit from strengthening or other changes, are both relatively straight-forward. The Act is short and focused in what it seeks to achieve.

However, addressing the 'other relevant matters' is far more complex, largely because the Act exists in a context of three much broader, inter-related and complex issues.

The first is whether the Act is (or should be) 'right to farm' legislation. That term is not in the Act, but due to its genesis it is often referred to as Tasmania's 'right to farm' law. On that basis, it has been criticised as inadequate. Many in the agricultural community argue that a far broader and robust 'right to farm' is needed, one that provides greater certainty that, in any sort of conflict involving a farmer and another party, the farmer will prevail.

The second is how to ensure that scarce prime agricultural land is reserved for agricultural production (particularly of food), and not permanently lost to residential development.

The third and final issue is how best to avoid (or better manage) land use conflict. Many farming communities that were once relatively remote have been enveloped by residential developments servicing nearby cities and towns. Developing effective strategies to manage changing land use and reduce the likelihood of conflict between landholders is complex. Nuisance shield legislation has been an extremely popular way to address land use conflict in the USA, but it has been challenged as inequitable and ineffective in addressing the root causes of the conflict.

Many of the submissions to this Review accordingly sought to discuss one or more of these broader issues.

A 'RIGHT TO FARM'?

The term 'right to farm' seems to date back to the development of nuisance shield legislation in the US. It appears to have been a shorthand way to denote that a farm that was in business before new residents arrived had a 'right' to keep operating.

As one submission noted, under Australian law there is technically no 'right' to conduct agricultural activities. Agriculture is only a 'permitted use' in some areas (No. 10).

Other submissions argued that more should be done to ensure there is a genuine 'right to farm'. Three suggestions as to how to achieve that are discussed in detail below.

• EXEMPTIONS FROM ENVIRONMENTAL AND OTHER LEGISLATION

The *Environmental Management and Pollution Control Act 1994* ('the EMPCA') creates an 'offence of causing environmental nuisance' (Section 53).

In 2000, an amendment to EMPCA initiated by Paul Harriss MLC (as he then was) exempted noise emitted by or from a primary industry activity. The exemption does not extend to any other form of environmental nuisance, such as odour or chemical spray.

However, a number of submissions to the Review noted that, as allegations of environmental nuisance under Section 53 of EMPCA have become increasingly common, protection for primary industry activities should be extended to other pollutants.

Noise is possibly the most common cause of conflict between farming and non-farming neighbours, and its impact is usually confined to inconvenience rather than tangible harm. The amendment to EMPCA by the Private Members Bill in 2000 was repeatedly stated by the Member to be confined to noise emissions. There was no call during the Parliamentary debate or subsequently to extend the amendment to other 'pollutants', and no concrete evidence presented during this Review that further exemptions to EMPCA should be considered now.

There were calls in other submissions that farmers who can demonstrate that they are using industry accepted practices be exempted from a range of legislation, including animal welfare, fire and forest management.

Changes that would impact on the operation of other legislation need to be considered in the context of the Government's broader red and green tape reform agenda, in which

the agricultural sector is already receiving significant attention. However, it must be noted that exemptions to specific legislation or regulations can only be considered after careful analysis of the potential impacts, and thorough consultation with the entire stakeholder community.

- RATE RELIEF

Farmland which has become suitable (and zoned) for residential development usually increases significantly in value. As rates are determined on the basis of land value, a farmer who opts to continue farming can end up with a much higher rates bill.

Differential assessment laws are sometimes used to direct local government to assess agricultural land at agricultural value, rather than at full market value. One submission noted that such laws are very popular in the USA (No. 13).

Investigations by the Project Team revealed that Tasmania does have a differential assessment regime. Division 8 of Part 9 of the *Local Government Act 1993* permits a farm to apply for 'urban farm land' status, after which valuations must be made on the basis that the land is a farm.

As awareness of this aspect of Tasmania's Local Government legislation may be low, it was thought appropriate to highlight this option to the stakeholder community.

- COMPENSATION FOR FARMERS

One submission argued that if legislation or regulations impinge on the rights of a farmer to carry out his or her legitimate business, compensation should be paid (No. 13).

Compensation is already available in a number of circumstances, and is often a mechanism offered to ensure that the costs of legislative or regulatory change are not borne disproportionately. Two examples include Section 41 of the *Nature Conservation Act 2002,* which permits an affected owner to apply for compensation from the Government for any financial loss suffered by that landowner, and the grants program initiated in 2011 to support pork and egg producers to convert facilities to comply with new regulatory conditions.

The Government's commitment to require a Regulatory Impact Statement for all new legislation will ensure that there is even greater scrutiny of any new legislation or regulations that could impact systemically on agricultural or other businesses.

PROTECTION OF PRIME AGRICULTURAL LAND

The loss of prime agricultural land to expanding residential development is considered to be a major problem all over the world. It is particularly an issue for Australia. As one submission noted, 'it is estimated that only 10% of Australia's land mass is arable land suitable for soil-based agriculture and livestock production, and much of this marginal with respect to water and nutrient regimes' (No.13).

Policies to maintain arable land for food production are therefore legitimately in the public interest. This has been implemented in Tasmania by the *State Policy on the Protection of Agricultural Land* (PAL Policy), which provides strategic planning principles to conserve and protect agricultural land.

However, such policies necessarily restrict the options available to landholders, and arguably raise questions of equity.

Other jurisdictions have developed mechanisms to compensate landholders, including the 'Transfer of Development Rights' (TDR) and 'Purchase of Development Rights' (PDR). Both give farmers an option to record a deed restriction on their properties to ensure its permanent continuation as agricultural land, in exchange for compensation either from developers (TDR) or from government or non-government organisations (PDR).

Several submissions sought to discuss concerns about the PAL Policy, or to suggest that TDR or PDR might be an option for Tasmania.

As the PAL Policy is to be reviewed in the very near future, it is appropriate that issues around PAL and any alternative options to preserve agricultural land be considered by that review process.

ALTERNATIVE OPTIONS TO REDUCE LAND USE CONFLICT

Mandatory Disclosure

One approach to try and reduce land use conflict has been to require 'mandatory disclosure' to potential purchasers of land in rural areas. If potential purchasers are adequately warned about the amenity impacts of living in an area which includes commercial agricultural production, those who are likely to be disturbed by such activities will be less likely to purchase there, or have to consider themselves duly warned if they do.

Mandatory disclosure is also considered to strengthen the legal position of an agricultural business against actions subsequently brought by an aggrieved neighbour, as it can serve as evidence that the purchaser was informed about the environment into which they were moving.

There is currently no mandatory disclosure of agricultural issues required by Tasmanian conveyancing legislation (*Property Agents and Land Transactions Act 2005*). The question of whether there *should* be was included in the Issues Paper, and there was general support for that proposal in the submissions.

However, this proposal poses its own challenges. In Victoria, all real estate contracts (including those for sales in inner metropolitan areas) previously had to contain a generic warning about 'commercial agricultural production activity [which] may affect your enjoyment of the property'.

A review of that element of the law found that most stakeholders believed generic warnings were ineffective in raising awareness. Potential purchasers were desensitised by the plethora of warnings, and disregarded them.

(Victoria has now changed its legislation to incorporate a different approach, which now requires vendors to provide a standardised 'Due Diligence Checklist' to encourage potential purchasers to do their own thorough homework on the property they are considering. This change has been criticised extensively by the Victorian Farmer's Federation.)

If generic warnings are considered to be ineffective, the question then becomes whether vendors of land in agricultural areas should be instead compelled to articulate, in detail, the amenity impacts that neighbouring farms may have on the land in question.

The obvious problem with this approach is that it would increase the regulatory burden on vendors and agents, arguably adding more 'red tape'. A number of submissions noted

this negatively, as well as the associated cost burden and the risk that mandatory disclosure might be implemented inconsistently.

A more fundamental problem might be that, if a mandatory disclosure statement had to detail the *current* agricultural activities in the area, it might inadvertently prevent farmers from improving, innovating or otherwise changing the activities of their farming business. It would be a perverse outcome if a neighbour could claim that noise from a newly installed irrigator pump was not included on the mandatory disclosure statement received when he bought his property, and could therefore never be considered a legitimate activity of that farm.

It is therefore the conclusion of this Review that mandatory disclosure can be a useful tool in jurisdictions where no nuisance shield legislation exists. This would currently include every other Australian state and territory, and mandatory disclosure is accordingly required in many of them.

However, mandatory disclosure is largely rendered irrelevant by the existence of the *Primary Industry Activities Protection Act 1995*. If the Government intends to retain the Act, there is no compelling need to introduce mandatory disclosure requirements.

What may be useful, however, is a requirement in real estate contracts that draws the attention of purchasers to the existence of the Act. One of the major findings of the Review is that awareness of the Act is low, even amongst agricultural businesses and peak bodies, and amongst the very 'tree-change' landholders whose rights are specifically impacted by it.

If potential purchasers of rural properties are informed simply that the Act exists, they will be made aware that they will not have the full range of common law remedies available if they are aggrieved by the actions of their farming neighbours. This might deter those who are particularly sensitive from making an ill-informed purchase.

Mediation

Several jurisdictions in the USA have established specific organisations to mediate conflicts between land users. This was also the basis of the *Agricultural Practices (Disputes) Act 1995* (WA), which was sometimes referred to as the Western Australian 'right-to-farm' legislation.

Some commentators argue that such bodies are the only legislative tool that actually attempts to resolve the conflict that can emerge between landholders, rather than

simply suppressing the rights of one party. Two submissions to this Review suggested that consideration be given to establishing a dispute resolution mechanism to handle conflict between farming and non-farming uses (Nos. 3 & 10).

However, research indicates that formal mediation bodies established in the USA have had very little work. Informal methods employed at the local government level seem to resolve most issues.

Furthermore, the Western Australian legislation was repealed in 2011 on the basis that it was not being utilised.

There is accordingly little evidence to suggest that the establishment of a mediation body, or defined meditation pathways for land use conflicts involving agriculture, would provide significant benefits to Tasmania.

Planning

Many submissions to this Review noted that the preferable and best way to reduce land use conflict is a strategically developed and robustly implemented planning system.

Accordingly, many of the suggestions received related to planning, including:

- insert a threshold farming practices test before any injunctive relief could be brought under the *Land Use Planning and Approvals Act 1993*;
- insert farmer-aware membership into the Resource Management and Planning Appeal Tribunal:
- imposing stricter building standards for housing in agricultural areas;
- amend *Local Government Act 1993* regulations around building; and
- remove loopholes that allow small subdivisions of rural land.

These suggestions will be provided to the Minister for Planning for his consideration.

Alternative proposals

A number of other proposals for reducing or managing land use conflict were raised in the submissions.

- Two submissions encouraged the further development and use of 'Good Neighbour Charters' (Nos. 2 & 5). As the Issues Paper noted, the Government has committed to developing a Good Neighbour Charter, but that process is focused primarily on

detailing the rights and responsibilities of the Crown (as a substantial land manager in Tasmania) and adjoining landowners with respect to fire, wildlife and weeds.

The most prominent example of an industry Good Neighbour Charter was developed by the commercial forestry industry in Tasmania to articulate its commitment to open and considerate engagement with their neighbours and local communities.

Peak bodies or specific sectors within agriculture are best placed to judge whether a Good Neighbour Charter might offer a benefit sufficient to justify the effort involved in developing such an instrument. It does permit the leaders of an industry sector to positively influence the practices of others, and thereby maintain the 'social licence' of the entire industry.

- Several submissions argued that the Government should do more to educate and inform those who have made (or are considering) a move to a rural area. This is an initiative Government may wish to pursue.

  For example, there is already a great deal of information on the internet about the positive and negative aspects of a 'tree-change' move, which could be adapted specifically for a Tasmanian audience and included as a static part of the DPIPWE website.

  This could also be another opportunity to draw the attention of purchasers in rural Tasmania to the existence of the Act, and the impact it has on their rights as a potential neighbour of a commercial farm.

Appendix 1: List of Submissions

Submission No.	**Name**
01	Ben Hiscutt
02	Australian Forest Growers – Tasmanian Branch
03	Derek Smith
04	Cuthbertson Bros Pty Ltd
05	Tasmanian Agricultural Productivity Group Ltd (TAPG)
06	Mark & Judith Purton
07	Poppy Growers Tasmania Inc
08	Councillor Alex Green, Southern Midlands Council
09	Southern Midlands Council officers
10	Environmental Defenders Officer (Tas) Inc
11	Simplot Australia Pty Ltd
12	Mervin C Reed
13	Tasmanian Farmers and Graziers Association (TFGA)
14	Tasmanian Island Pork Alliance Inc (TIPA)
15	Fruit Growers Tasmania Inc
16	Wine Tasmania

Appendix 2: References

Acts/Bills

Agricultural Practices (Disputes) Act 1995 (WA)
Environmental Management and Pollution Control Act 1994 (Tas)
Local Government Act 1993 (Tas)
Nature Conservation Act 2002 (Tas)
Primary Industry Activities Protection Act 1995 (Tas)
Property Agents and Land Transactions Act 2005 (Tas)
Sale of Land Act 1962 (Vic)

Case law

Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d 309 (1998)

Sturges v Bridgman (1879) LR 11 Ch D 852

Agricultural Practices Board of Western Australia, *Annual Report 2011,* September 2011

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Lapping, M, Penfold, G. and Macpherson, S., 1983, *Right-to-farm laws; Do they resolve land use conflicts?*, Journal of Soil and Water Conservation. November-December 1983

McNeil, H, 'Does the Environmental Planning and Assessment Act 1979 (NSW) or right to farm legislation provide a solution to the issue of rural land use conflict?', *Local Government Law Journal,* Volume 12, Number 2, November 2006

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Second Reading Speech, *Environmental Management and Pollution Control Amendment Bill 2000*, Hansard, Tasmanian Parliament, 2000

Victorian Farmers Federation, 'State government backflips on 'Right-to-farm', February 2014 (VFF press release)