SUBMISSION

by

in respect of the

Review of Primary Industry Activities Protection Act 1995

4th August 2014

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Poppy Growers Tasmania Inc

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Starting point – in the defence of farmers and farming.

Poppy Growers Tasmania understands that the Tasmanian Government is committed to ensure agriculture has appropriate protections for farmers to lawfully carry out primary industry activities without interruption or risk of interruption from third parties. As such is the Act still required by farmers or is it just another example of 'red tape'?

Terms of Reference

a. 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;
b. Whether any changes are required to the Act to strengthen the legal position of farmers
c. Any other relevant matters

A limited focus but a very specific defence

The Act (also referred to as ***Right to Farm***) sits in the statute books as a shield, able to be invoked in a legal proceeding as a defence against a certain type of hostile legal proceeding, against a traditional farmer . This is about Supreme Court civil litigation concerning public nuisance, which is by all accounts, not the first point of call for a property owner aggrieved at a farming neighbour's farming activity. Consequently it is trite to observe that the Act may seldom or never get a mention in case law. But that does not mean that it is not working.

The Primary Industry Activities Protection Act sits as a rule to guide lawyers and potential litigants alike prior to litigation ever commencing, as much or more than it would ever determine a legal matter. In this respect ***Right to Farm*** just like other legislation establishes rules for certain types of proceedings, rights, obligations and entitlements. For example, the Limitation Act and its predecessors has for generations set up time limits for the commencement of common law legal proceedings.

Other threats to farming practices

As a general rule, privately commenced legal suits fade away where there are new and evolving forums for airing neighbourhood disputes and complaints. Whatever is easier and cheaper will attract those who wish to complain at least cost and with maximum impact.

During recent decades and with Tasmania no exception, administrative law has expanded in combination with the growth of regulation at all levels of government.

In 1993, only a few years before the Act in 1995, Tasmania followed other states with uniform acceptance across Australia to introduce a suite of environmental and land use planning measures. Where town planning had played a minor role in the control (or restriction) of the use and development of land, the Land Use Planning and Approvals Act set up a surge in local level rule making, with ever-sophisticated planning schemes introducing new forms of constraint on land usage.

Land Use Planning is now the dominant paradigm

Farming activities do not occur in a vacuum. The direct observation is that, as statutory instruments established under legislation, local planning schemes are the first reference for persons who might object to a farmer's activity. In other words, combined with Environmental Management and Pollution Control Act regulations and Veterinary Chemicals control of Use (Pesticides), non-court complaints and litigation will be the most likely encounters for farmers battling complaints from hostile neighbours, those with a grudge or extreme interest groups or any combination of the above.

Additionally, where it may be that land zoning changes, such as on town fringes, have led to certain agricultural practices being non-conforming, argument may exist about a farms ***Right to Farm.***

A classic example is that of the iconic school farm at Brighton in Tasmania where farm animals had safely grazed for years, until the Council determined that there was no use right and the practice should cease, July 2014. Only the progress of a rezoning application will assure the right of the school to carry out farming activities into the future, regardless of whether or not there is a single state-wide or regional or simply a local planning scheme. The zoning is what will be applied and must be applied by a Council in its Municipal area under LUPA obligations on Councils.

As described, the Act does not create any red-tape due to its passive role as a defence. Neither does it extend very far into the world of disputes about farming practices, where more recent modes of dispute origination have been allowed to develop.

The Act does nothing to prevent an application about something other than a nuisance.

What is nuisance at law?

The legal definition of nuisance is acceptably covered in the preeminent text of Torts, **Fleming's The Law of Torts** 10th Edition. Chapter 29 of this most recent edition deals concisely with the tort and its relationship both with common law negligence and more particularly with the statutory changes that society has demanded.

Public and private nuisance are distinct. There can be no doubt that ***Right to Farm*** is about private nuisance. Public nuisance is to do with interference with public or common rights, such as use of a waterway. Private nuisance is about 'invasions in the use and enjoyment of land' [21.20].

As outlined earlier in this submission, the creeping march of land use planning and environmental legislation either shadows or indeed overtakes concepts of private nuisance, especially where the law would not give someone a cause of action.

"*In order to be an actionable nuisance, there must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty habits of human living but according to plain and sober notions among ordinary people'… Walter v Selfe (1851) 4 De G & Sm 315 at [21.90] Flemings.*

What farmers must contend with, self-evidently, is not so much genuine claims in actionable nuisance, for which ***Right to Farm*** offers protection, but nuisance complaints with authorities or direct neighbour conflict, or both.

Closer examination of nuisance indicates that long running 'nuisance' creates rights by prescription at common law except that the intermittent nature of crop farming, such as poppies can prevent this traditional defence being acquired, as does other anti-prescription legislation. Fixed types of farming, such as dairy or housed animals, may be better defended.

So it can be said that ***Right to Farm*** plays a vital role in giving reality to the Tasmanian farming community expectation that a person that 'comes to the nuisance', such as the incoming "bio-dynamic, tree-changing" purchaser of a small acreage home, can't complain. Fleming [21.240]:

> *It seems to have been supposed at one time that a person who chose to acquire property with knowledge that it was exposed to a nuisance, was precluded from complaining about of it … but this view has long been exploded. … Less obvious is allowing a newcomer to object to a use that before his arrival had not constituted a nuisance to anyone, as when a residential developer moves into an area adjoining a stock yard. But even in such cases it may be against economic efficiency and the public interest to freeze the character of the area for ever by a prior use (Sturges v Bridgman (1879) 11 Ch D 852 at 865 …. But while this could justify an injunction against a pig farmer to protect a later residential development, might it not be conditioned by awarding him the cost of relocation, as in Spur Industries v Del E Webb Development CO 494 P2d (Arizona 1972)*

The Spur case above was about the growth of Sun City in Arizona, a retirement town built on an old Arizona ghost town started in 1960. Both it and the once distant neighbouring pig farm grew until they were in conflict. The Arizona Court ordered damages to the pig farm, Spur, for what it cost to move the pig farm away from the new town.

This type of defence or protection for farmers is absent from Australian law and yet Tasmania is unique in its ***Right to Farm*** by giving farmers a statutory **Coming to the Nuisance** remedy as was recognised in US law in the Spur case.

What about compulsory notification?

Direct mandatory notification of farming practices to incoming buyers could create more problems than it would remove and be a classic example of expanding green tape. However, clear, mandatory meaures in legislation and in subordinate legislation such as planning instruments would be a powerful communication method and a vital tool for sustaining farming practices.

Solution:- use Tasmania's Land Use system to back up and reinforce ***Right to Farm***, with contemporary agricultural and cultural practices assured.

Tasmania already promotes its rural resource and protects it from fragmentation and loss to production through PAL.

A State-wide *Right to Farm* Use Policy – linked in with Tasmania's Land Use Framework

Ontario, Canada is a place that was grappling with ***Right to Farm*** at similar times to Tasmania in the 1990s and yet with urban land squeeze. Ontario contains both Greater Toronto and Ottawa, Canada's capital. While most of Tasmania does not suffer from a land squeeze, the day may yet come when it does.

The Ontario Legislative Assembly **Farming and Food Production Protection Act of 1998** gives extra oomph to ***Right to Farm*.**

The Act prevents injunctions for accepted farming practices and overrides local 'by-laws' e.g. planning schemes, for example with exemptions for motor vehicles out-of-hours if connected with agriculture, such as tractors or spray-rigs at night or early morning.

Tasmania can go further to promote farming

This submission has already demonstrated the latent value of ***Right to Farm*** in terms of its protection for farmers against neighbours who **come to the nuisance.**

However there is opportunity to do more, in light of the expansion of land use controls and the known conflicts that occur both with land zoning and with complaints.

Using the Ontario legislation as a guide there is the opportunity to:

- Insert ***Right to Farm*** into enforcement provisions in the Land Use Planning and Approvals Act, such as would create a threshold farming practices test before any injunctive style enforcement application could be brought by any party under LUPA
- Mandate ***Right to Farm*** in the creation of planning schemes, in zoning, in pre-existing non-conforming use provisions
- Insert farmer –aware membership into the Resource Management and Planning Appeals Tribunal when it deals with disputes about farming practices, such as the RMPAT Act uses persons with expertise in its current workloads where relevant (section 6 re composition).
- Insert ***Right to Farm*** into environmental nuisance investigations and enforcement in the Environmental Management and Pollution Control Act and its subordinate regulations

Tasmania needs farming opportunities to grow its economy

As in any matter of public policy, it is a matter of communicating the vital importance of farming activity to the wider community. Without nourishment, an organism dies. Without healthy agriculture, indeed expanding agriculture as Tasmania is forced to exploit its competitive advantages in poppies and other niche crops, the Tasmanian economy will not grow, transition or even hold its own.

The poppy crop is Tasmania's largest stand alone, unique terrestrial agricultural enterprise. But in reality it cannot stand alone – it needs vibrant mixed farms to keep it alive. A fast growing, intensively managed crop, it is absent from the landscape for much of the year but activity intensifies through the Spring months with massive investment in time, equipment and supplies. Farmers need the assurance not only of opportunity to grow the crop, but the backing of the community to get the job done.

Right to Farm legislation is, as well as being a practical defence of last resort, a positive statement of community support for farming.

Poppy Growers Tasmania commends the Tasmanian Government to keep ***Right to Farm*** and to consider the real opportunities that exist to widen and strengthen the community safety net for farmers.