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using the law to protect the natural and built environment

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The Project Team – Review of the *Primary Industry Activities Protection Act 1995*
Department of Primary Industries, Parks, Water and Environment
GPO Box 44
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By email: PIAP@dpipwe.tas.gov.au

Dear Project Team,

Review of *Primary Industry Activities Protection Act 1995*

Thank you for the opportunity to make a submission to this review process.

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. Our organisation provides legal advice and representation, community legal education services and engages in law reform to ensure adequate regulation of environmental issues.

EDO Tasmania has been contacted on numerous occasions by landowners affected by primary industries adjacent to them or in their locality, but has never acted for a person taking action against a farmer in relation to nuisance arising from agricultural activities.

EDO Tasmania fully supports the statement in the Issues Paper that agriculture is a key strength in the State's economy. We would add that farming has a long history in Tasmania and is an activity to be respected and valued. It is an essential feature of the landscape as it provides the community with many of its daily needs. To that end - farming, as a land use, needs to be encouraged and facilitated.

Residents in rural communities who are not farmers also contribute to the Tasmanian and local economy. EDO Tasmania believes that such residents, occupying their property lawfully under relevant planning instruments, are entitled to the quiet enjoyment of their property. The task, therefore, is to minimise the conflicts arising between legitimate farming and non-farming activities in rural areas.

It is regrettable that the tone of the Issues Paper seemingly elevates the economic value of farming above all other considerations (including non-economic factors relevant to farmers themselves) and, importantly, presents no evidence that land use conflict is currently having any economic consequences for Tasmania. However, we acknowledge the financial and other related impacts on individual farmers in resolving land use conflicts that do arise.

In our view, such conflicts would be more effectively addressed through improvements to the planning system than in specific legislation restricting nuisance actions. Nuisance claims are generally symptomatic of land use conflict, rather than the root cause of it.

Our submission makes a number of general comments before addressing the specific questions set out in the Issues Paper.

General comments

Common law rights should be removed only where there is a clear justification for doing so. Having reviewed the original second reading debate for the *Primary Industry Activities Protection Act 1995* (***PIAP Act***), it is not clear that specific evidence was presented to demonstrate the prevalence of nuisance actions at the time the legislation was originally passed. Similarly, the Issues Paper provides scant evidence regarding the extent of current problems faced in rural communities.

Given the availability of other legal actions that are not restricted by the PIAP Act, including civil enforcement proceedings for an environmental nuisance under the *Environmental Management and Pollution Control Act 1994*[1], nuisance actions under the *Local Government Act 1993* and common law trespass, it is questionable that the PIAP Act has any significant impact in reducing claims in relation to farming activities. Furthermore, where a serious nuisance issue exists, a resident is likely to take whatever action they can to alleviate the problem, irrespective of the operation of the PIAP Act. The PIAP Act may stop common law nuisance actions, but does little to curtail:

- repeated contact with the farmer, Council, state government departments and members of Parliament regarding a nuisance issue;
- threatened or actual legal action on the basis of another tort or under other legislation;
- acrimony between neighbours, which can have a range of consequences.

EDO Tasmania is concerned that undue resources are being used to deliver on the rhetoric of "right to farm" legislation, rather than the more complex (and, ultimately, more effective) task of improving planning frameworks to manage land use conflict in rural areas.

Response to Questions

Are there other examples of innovative laws protecting primary industry activities that Tasmania can learn from?

Given resource constraints, EDO Tasmania has not been in a position to conduct a thorough review of laws designed to manage conflict between agricultural and non-agricultural uses. However, aspects of the following laws should be considered:

- Legislation which seeks to implement a dispute resolution mechanism to address land use conflict is preferable to one which restricts legal options without resolving the cause of the conflict. Examples include the *Agricultural Practices (Disputes) Act 1995* (WA) and the *Farm Practices Protection (Right to Farm) Act* 1996 (British Columbia).

  The creation of a process by which disputes can be filtered, allowing an independent body to determine whether the agricultural practice is operating appropriately, and the extent to which impacts on neighbours are "reasonable", could have a positive impact.

  However, we note that the Western Australian legislation was repealed on the basis that its provisions were rarely used. This again calls into question the extent to which legislation to address the problem of rural land use conflict is warranted. The Western Australian experience also cautions against developing a complex dispute resolution service – assessing complaints should be simple, flexible and relatively informal, as should the body established to undertake the task. Ideally, this responsibility would be given to a body already performing other roles, rather than one convened only for the purpose of resolving land use conflicts.

- Former 'right to farm' legislation in Washington State sought to discourage subdivision of rural land which often triggered land use conflict. The laws prevented any landowner who "sells or has sold a portion of that land contiguous to a farm for residential uses" from relying on the protections otherwise offered by the legislation. This attempted to deal with the phenomena of farmers effectively contributing to the problem that the legislation sought to address.

[1] Section 53(5) of EMPCA provides that noise emissions that would be protected under the PIAP Act cannot constitute an environmental nuisance. However, the emission of odours, dust or spray drift could still be characterised as an environmental nuisance in some circumstances.

However, similar provisions were not adopted in other states' legislation and the current Washington law does not include this restriction.[2]

EDO Tasmania does not necessarily advocate for farmers who subdivide their property forfeiting protections. However, the approach adopted in the earlier Washington legislation again recognises that rural land use conflicts are not black and white and should not be treated as such. By immunising a farmer who invites residential development against the consequences of such development (such as complaints regarding farming practices), the PIAP Act does nothing to discourage ad hoc subdivisions and encroachment of residential uses.

- As discussed below, we support amendments to require disclosure regarding nuisances to potential purchasers.

If the specific restriction approach of the PIAP Act is maintained, we strongly support continuing to confine the Act's application. That is, rather than applying to all "farming practices", protections should apply only to established agricultural activities that pre-date any conflicting land use, and that are not substantially altered or expanded following the introduction of the non-farming land use.

Are legal protection laws the appropriate mechanism to resolve land use conflict?

Protection laws are not an appropriate mechanism for several reasons:

- They fail to acknowledge the legitimate interest of residents to enjoy their property. Where a person is a lawful resident, they are entitled to quiet enjoyment of it.
- They are not effective. There is no evidence in the Issues Paper that the current laws have reduced land use conflict.
- They are simplistic and fail to acknowledge the fundamental cause of the land use conflict: the sale of agricultural land for residential use. Planning has a role to play here as does creating process disincentives (such as mandatory disclosures or warnings) for agricultural property holders wanting to sell small parcels. This will have a financial impact on farmers who wish to liquidate parts of their property.
- They do not encourage long term dispute resolution. The protection law approach can result in a refusal to try and resolve land use conflict constructively. Elevating a farmer's rights in this way removes any incentive to resolve the conflict via discussion.

As highlighted above, land use conflict is best resolved through planning mechanisms, including the *State Policy on the Protection of Agricultural Land 2009* and planning schemes. This point is illustrated by the decision in *Williams Davies v Devonport City Council* [2002] TASRMPAT 145, in which the Tribunal refused to allow subdivision of rural land:

> 20. The Tribunal finds having regard to the above evidence that use of the existing 60 hectare lot for farming purposes is already inhibited to an appreciable degree by the existence of the residences to the west. Activities such as spraying can occur without troubling persons in those residences while the wind is blowing to the general east. Placing a further residence at the north-eastern corner of and immediately adjacent to the part of the parent site which is presently used for agriculture and where there is no reason to suppose it will not be used for that purpose in the future, will further limit the conditions in which activities such as spraying can occur. In that way it will tend to inhibit the use of the agricultural land on the remainder of the lot, and in the same way potentially inhibit the use of the agricultural land to the east, for agricultural purposes. To allow a subdivision having a significant potential for such an effect would lessen the utility of the rural land for the purposes for which the Tribunal considers the Scheme is likely to have zoned it Rural. For that reason alone the Tribunal considers that the discretion provided by the Planning Scheme should be exercised so as to refuse the application.

Has the PIAP Act been an effective tool in upholding farmers' rights?

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[2] See Lapping et al. 1983. 'Right to Farm Laws: Do They Resolve Land Use Conflict?' http://www.farmlandinfo.org/sites/default/files/RIGHT-TO-FARM_LAWS_DO_THEY_RESOLVE_LAND_CONFLICTS_NOV-DEC_1983_1.pdf

It is not clear what the expression "farmers' rights" refers to. There is no "right" in Australia to conduct agricultural activities of any sort. In relevant areas agriculture may be a "permitted use" under the local planning scheme as distinct from a "right". This language is unhelpful in terms of sensibly addressing land use conflicts. Perhaps the question is better framed as "[H]as the PIAP Act reduced land use conflict between agriculture and other land uses?"

Perversely, in *Williams Davies v Devonport City Council* (see above), the PIAP Act was used by the proponent to argue ***for*** a subdivision on the basis that farming activities would not be impacted as new residents were prevented from taking nuisance action. This case illustrates the difficulties with placing the burden of tolerating a nuisance on new residents lawfully occupying their property. Instead, the landowner seeking to subdivide, the Council and planning system should share responsibility for avoiding land use conflicts. In *Williams*, the Council and the Tribunal did just that.

We are not aware of any other cases in which the PIAP Act has been applied. While this could indicate the legislation has discouraged nuisance actions, it is also worth noting that, in our experience, it is not the PIAP Act that discourages nuisance actions – it is the costs and risks of civil litigation.

We are not aware of civil action taking place prior to the PIAP Act being implemented.

As part of the review of the PIAP Act, the government should undertake (or engage another body to undertake) the following work:

- A review of case law prior to the commencement of the PIAP Act to determine whether nuisance actions were being issued;
- A review of case law since the commencement of the PIAP Act to determine whether there has been an appreciable reduction in nuisance actions;
- A review of Tribunal decisions where an assessment of a subdivision proposal on agricultural land has involved consideration of land use conflict issues. We have referred to one case above. Another example is *I M & J E Monkhouse v West Tamar Council and C Cohen and Associates obo B Bennett* [2005] TASRMPAT 88. In that case the Council decision to approve the permit was upheld by the Tribunal.

This work would allow the government to make a more rigorous assessment of the impact of the PIAP Act in managing land use conflict in rural areas.

Are the definitions in the PIAP Act sufficiently clear and do they cover all relevant activities?

The definition of "primary industry" should be amended to clarify whether it is intended to capture marine farming activities.

While the remaining definitions are sufficiently clear, we are concerned at the potential breadth of the criteria in section 4(c):

> **(c)** the activity is not substantially different to the primary industry activities that were, or might reasonably have been, carried out on that area of land at the beginning of that continuous period or, if the activity is substantially different to those activities, the difference is attributable to improved technology or agricultural practices;

The qualifications of "might reasonably have been carried out on" and "attributable to improve technology or agricultural practices" potentially allow a significantly wider range of activities to be protected, with significant implications for neighbours.

The case study on the following page illustrates the complexity of this problem.

Case Study:

A landowner purchases a small parcel of land from a farmer who has subdivided the lot from his farming title. The farmer historically has utilised the balance property for low intensity grazing. This is the use when the purchase of the lot is made, however cropping could reasonably have been conducted on the land. Several years later, the farmer leases the property to an interstate vegetable producer, who changes the agricultural practices on the land significantly. Tractors are being operated from 4am in the morning, broad scale cultivation is occurring and large amounts of spray are being applied. The sprays and dust from cultivation ends up causing significant discomfort and annoyance to the resident.

The interstate operator refuses to alter their practices. The landowner refuses to discuss the issue with the resident and becomes abusive when approached. The Council refused to take any action citing the fact that agriculture had always been a permitted use on the land. The resident is now considering selling.

How could the Primary Industry Activities Protection Act 1995 be improved?

Mandatory disclosure of neighbouring agricultural activities is not currently required under Tasmania's land sales legislation. Would mandatory disclosure help prevent land use conflicts?

As outlined above, EDO Tasmania considers that the PIAP Act is not the most effective vehicle to address rural land use conflicts. Instead, consideration needs to be given to:

- amending the *State Policy on the Protection of Agricultural Land*;
- amending the *Local Government (Building and Miscellaneous Provisions) Act 1993*;
- removing loopholes in planning schemes that allow for small subdivisions of rural land.

EDO Tasmania recommends that these matters be considered as part of the work of the Planning Reform Taskforce. A stronger planning response would further obviate the need (if there is currently a need) for specific protection legislation.

In the interim, the PIAP Act should require mandatory disclosure of the permitted and discretionary uses under the planning scheme, including a note regarding general emissions associated with agricultural properties (noise, odour, dust, spray drift), where rural land is purchased or leased. This should include primary industry and extractive industry uses.

Requiring such disclosure would put potential buyers on notice regarding likely impacts and discourage those buyers who would find such issues a nuisance. Explicitly putting buyers on notice would also serve as a response to subsequent complaints at the individual, local and state government level.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us to discuss any issue raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:

Adam Beeson
Lawyer