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9D059

4 October 2019

The Hon Vicki Chapman MP  
Attorney General South Australia  
GPO Box 464  
Adelaide SA 5001

Dear Attorney General,

**Re: Proposed Amendments to Trespass Legislation – South Australian Dairyfarmers Association Submission**

Thank you for the opportunity to respond to the circulated draft amendments to the Summary Offences Act which you have circulated to a number of organisations including the South Australian Dairyfarmers' Association (SADA) on the 4 September 2019.

SADA wishes to make a number of observations regarding the proposed amendments as well as various government procedures which underpin the oversight of such legislative instruments with a particular focus on the dairy environment.

At the outset SADA wishes to indicate its thanks to the South Australian Government for taking action on in the area after SADA and a number of other organisations communicated their concerns with Government. SADA has already been proactive in this area by hosting workshops with farmers since January this year. It is pleasing that the SA Government has taken such a positive response in light of recent events nationally.

In other jurisdictions where these offences have been proved incomplete submissions by prosecutors supported by sympathetic court decisions have seen these forms of trespass disposed of with little or no consequences for the perpetrators.

**The proposed amendments**

SADA submits that the proposed amendments do cover the field generally, however we wish to make the following observations regarding the proposed amendments and alterations which may be considered.

SADA does not agree with the exceptional circumstances provision which is contemplated by the proposed section 17 (3a). If a farmer has suffered a loss because of the unlawful actions of a trespasser SADA believes there should be no judicial discretion as articulated by the proposed sub section. It is not the expectation of SADA or its members that farmers should be precluded from recovering costs for losses under any circumstances be they exceptional or otherwise. SADA recommends that the words, "*unless exceptional circumstances exist*", be omitted from the bill which will be introduced to the Parliament.

SADA is also critical of the limitation imposed by the proposed section 17 (3b). This section limits submissions to the court to the prosecutor or the defendant. It is the position of SADA that where a farmer has suffered a loss arising from a trespass and that submissions be permitted to be made to the court by the farmer, (or the farmer's legal representative) directly. This would enable representation beyond a mere victim impact statement but direct representations to his/her honour directly pertaining to impact suffered by the farmer. SADA makes further observations concerning the submissions which may be made by a prosecutor below.

## **Lawful Excuse**

SADA notes that the proposed section 17 (a1) offers the defence of lawful excuse. SADA is aware of the decision of the court in *Mark v Henshaw* (1998) 85 FCR 555. This was a case of an invasion in a battery chicken farm where the subordinate magistrate's court had found that demonstration/activism was a lawful excuse. The appeal heard before the full court of the Federal Court which held at 559;

*We do not accept that it is reasonable to enter as a demonstrator, upon the premises of another when the occupant is carrying on a lawful activity of which the trespasser disapproves. To find otherwise would mean that the citizen would not receive the protection of the law to which he or she is entitled. It would mean that any dissident might be at liberty to enter his or her opponents' premises in pursuit of a cause.*

SADA believes this to be correct, however, SADA also suggests that as Attorney General you may consider referring to this case in the second reading speech of the bill so as to place the matter clearly beyond doubt for any court contemplating the such a defence and which turns to the second reading speech for guidance as to the intent of the parliament.

## **Trespass Notices**

SADA is of the belief that farmers should be able to issue a Trespass Notice similar to the notice which is contemplated by section 9 of the *Northern Territory Trespass Act 2000*. That section provides:

### **9. Giving directions or warnings**

- (1) *A direction to leave under section 7 or a warning to stay off under section 8 shall be given to the individual person concerned either orally or by notice in writing delivered to that person or sent to that person by post.*
- (2) *Where the person concerned is a member of a group, it is a sufficient compliance with subsection (1) in relation to an oral direction to leave or a warning to stay off if the direction or warning is addressed to the group or members of it and it is clear that the person concerned is included among those persons addressed.*

SADA further recommends that such a similar notice should be able to be given by a farmer to any person the farmer has, or reasonably expects will, trespass on the farmer's property and that the notice should remain in force for a period of up to two years.

Legislation empowering a farmer will be supported by SADA. If a farmer warns a person or people from his/her property and the farmer is able to supply proof of the lawful delivery of the warning, such as a recording placing the person warned clearly at the scene that that should be sufficient evidence to prove the person was warned.

Such a person when warned then commits an offence if they return to the property within a period of two years.

## **A dedicated Trespass Act**

The trespass laws of South Australia are untidy. Setting aside the common law relating to trespass the laws relating to trespass in SA are spread over several legislative instruments, namely, Part 6A of the *Criminal Law Consolidation Act 1935*, Part 3 of the *Summary Offences Act 1953* and section 48B of the *Pastoral Lands and Conservation Act 1989*. The *Crown Lands Act 1929* (section 294A) also touches on trespass but it does not form part of this submission suffice to show that the offence of trespass is governed by multiple acts. Presumably, the history of this separation was to create offences which were dealt with by way of actions which were commenced by the filing of complaints and informations which were aimed at separating the summary and indictable offences of trespasses.

South Australia has disposed of the distinction between those filing practices and the need for the separation of the variant forms of trespass is questioned.

Furthermore, the proposed amendments to the Summary Offences Act mean that the sections pertaining to trespass as a summary offence will also be a polyglot of substituted section numbers.

While a matter for government rather than SADA, amending an act, which has already seen a number of amendments and leaving trespass spread over multiple acts, SADA suggests that the law of trespass can be condensed into a single instrument dealing with both the summary and indictable offences.

Such a single act could also incorporate instruments like trespass offences, trespass notices and anti-drone legislation as suggested in this submission. However, having made this observation SADA would not support any undue delays created by such a wholesale revision of the state's trespass laws.

### **Expiation Notices**

SADA welcomes the proposed use of expiation notices regarding the interference with gates.

Nevertheless, SADA is concerned that the use of expiation notices has not been sufficiently examined. Firstly, the use of such an offence should also extend to fences. If it is an offence to interfere with a gate then it should also be an offence to interfere with a fence.

A person, if they damage a fence will commit the criminal act pertaining to damage however, some protesters may by their actions interfere with a fence where they do not cause permanent damage to the fence but nevertheless render the fence incapable of functioning as it was designed to do. For example, a person may prop apart strands of a fence in such a way that livestock could pass through the fence. This should also be considered as being an offence for the purpose of the act.

SADA also believes that expiation notices could be extended to the operation of the simple trespass contemplated by the Summary Offences Act, namely, those trespass offences that do not amount to aggravated trespass as contemplated by the proposed section 17 (a1)(b)(ii). SADA recommends the consideration of an amount of \$2,500 for such an expiation notice.

### **Court Submissions**

SADA also wishes to make comment regarding the prosecution of trespass matters in the Magistrates Court. It is likely that nearly all trespass related matters will be disposed of in the Magistrates Court which is in many ways the sausage factory of the judicial system. Police prosecutors in particular will in every likelihood be representing the Crown.

Where this occurs police prosecutors should make submissions which capture the threat that these forms of trespass actually represent remembering farms are not only places of business but also homes for the people who live on farms.

Moreover, the biosecurity threat which protestors represent should be made clear by police prosecutors when describing to the court the risks that trespassers represent, not only to their business, but industries as a whole across the state.

While not able to be written into legislation DPP and Police Prosecutions policies should be clear in terms of informing courts of the seriousness that these trespass offences represent.

### **Drones**

The original common law concept was that a landowner's aerial rights extended indefinitely above the land holder's land and down to the centre of the earth. Needless to say, that is no longer without exception however, the common law in Australia isn't absolutely clear on this point.

Drone technology, when left to the common law, present the courts with a challenge. The judgement in 1991 decision in *Bendal Pty Ltd v Mirvac Project Pty Ltd* [1991] 23 NSWLR 414 – 470 and *Perilya Broken Hill Limited v Valuer General* [2015] NSWLEC 43 have yet to be challenged as far as SADA is aware.

Those cases accepted the English standard from 1978 in *Bernstein v Skyview & General Ltd* [1978], that a landowner's rights in the air over the land should be limited "to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it." In Australia it is not clear how high that limit is. One expert has considered that and suggested that it would not be much higher than 200 metres above roof level: Gray "*Property in Thin Air*" [1991] CLJ 252-254. The Civil Aviation Rules of Australia limit a drone's ceiling to 121 metres (400 feet) above ground level, (AGL). As an aircraft minimum altitude is 500 feet AGL that makes sense as it assists in avoiding collisions between aircraft and drones.

Nevertheless, the law of trespass has little to do with aviation rules and therefore a ceiling of 500 feet in the Summary Offences Act is recommended by SADA. That way the use of a drone over another's property, without permission, would be illegal by one mechanism or another irrespective of the altitude of the drone. Drones used in this fashion also amount to an actionable breach of an individual's right to privacy. Particularly if it is equipped with a camera and is observing/ recording persons on the land below. Those are matters yet to be substantively settled in Australia.

Other rights might also be infringed. For example, the right to not be subjected to nuisance i.e. the right to not be stalked. However, the primary infringement from SADA's perspective is trespass. SADA does not seek to diminish matters pertaining to domestic violence or stalking but that such matters are outside of the policy orbit of this submission. Nevertheless, they are within the scope of your contemplation as Attorney General.

If a drone or its operator, is committing trespass, there is an opportunity for the law to describe what amounts to a trespass by a drone operator. Currently, at law there are actions that can be taken if an operator can be identified. The practicalities and uncertainties of the current law however potentially will make taking action difficult. Amendments to the law of South Australia should describe what amounts to a trespass by a drone operator and what actions can be taken should the pilot of such a vehicle be able to be identified.

### **Conclusion**

SADA does welcome the intention of the government to strengthen legislation relating to the laws of trespass, however, SADA also believes that there is an opportunity to do more with the amendments while they are under review.

If you have any questions regarding the proposals outlined in this document, please don't hesitate to contact the SADA offices so these matters may be unpacked more fulsomely.

Yours faithfully,



Andrew Curtis  
CEO.