

## WORKPLACES (PROTECTION FROM PROTESTERS) AMENDMENT BILL 2021

### General Overview

During the State Election 2021, the Government committed to legislation to amend the *Workplaces (Protection from Protesters) Act 2014* (the 2014 Act).

The 2014 Act is administered by the Minister for Primary Industries and Water, and the responsible Department in relation to the Act is the Department of Justice.

The Workplaces (Protection from Protesters) Amendment Bill 2021 replaces all the substantive provisions of the 2014 Act with a consolidated set of new provisions.

The Bill renames the Act as the *Workplaces (Protection of Businesses and Workers) Act*. The object of the amendments, as stated in the Bill, are to balance appropriately –

- the right of persons to carry out business activities on business premises, or in, on or from business vehicles, without being intentionally obstructed by trespassers or persons obstructing the use or construction of public thoroughfares or critical infrastructure; and
- the rights of persons to freedom of movement, assembly and lawful expression of opinion.

### Why are the amendments needed?

The Bill is necessary to address a High Court decision that certain provisions of the 2014 Act in respect of their operation on forestry land or business access areas in relation to forestry land are invalid because they impermissibly burden the implied freedom of political communication contrary to the Commonwealth Constitution. The 2014 Act provides for offences and police powers in relation to ‘protesters’ and ‘protest activity’.

The amendments provide a clarified, simplified framework for the purpose of protecting businesses and workers, with new offences and appropriately limited police powers relating to any person who trespasses or obstructs with an intention to substantially obstruct business activity. This purpose of the 2014 Act was recognised as legitimate by the majority of the High Court.

While trespass and obstruction of thoroughfares can already be offences under Tasmanian law, the Bill provides for offences that include additional elements (intention to substantially obstruct business activity), where a higher penalty is merited.

The Bill’s Application clause provides that the Act does not apply to the extent, if any, that it would infringe any constitutional doctrine of implied freedom of political communication.

Several jurisdictions have amended laws in relation to trespass and business activity, and the amendments to the 2014 Act have been informed by some of those approaches.

## What are the changes from the 2014 Act?

The Workplaces (Protection from Protesters) Amendment Bill 2021 provides for a new consolidated framework of revised provisions to ensure the lawful protection of businesses and workers while balancing rights, such as lawful expression of opinion.

## What are the new, and continuing, features of the framework?

### Objects and Application provisions

- These important new provisions, as described on page 1, balance rights and provide for no unconstitutional infringement of political communication.

### Definitions and Threshold

- The 2014 Act applies to conduct including that which would 'prevent, hinder or obstruct' business activity. The Bill provides a higher threshold of substantial obstruction of business activity. Obstruction is defined as 'means to prevent, hinder or obstruct, to a substantial extent'.
- Removal of all references to protesters and protest activity.
- Inclusion of a definition for critical infrastructure. The majority of other definitions remain the same, such as terms for business premises and so on. Some definitions, such as business premises protected by the Bill, can be narrowed (but not expanded) by regulations if necessary.

### New Offences

- The existing offences under the Act are removed and replaced with:
  - new, specific offences for intentionally and substantially obstructing business activity arising from trespass by any person on business premises and in, or on, business vehicles.
  - a new, specific offence for intentionally and substantially obstructing business activity by obstructing use or construction of public thoroughfares and critical infrastructure;
- A new threshold of 'intentionally' substantially obstructing business activity. This is a substantially higher test than the current 2014 Act which provides for a person who 'knows or ought reasonably be expected to know' that their conduct would cause obstruction.
- the 'trespass' on premises or 'obstruction' of the thoroughfare or infrastructure must be voluntary and intentional (due to s 13 of the Criminal Code).

### Adjusted penalties for proportionality to existing offences

- Penalties are expressed in maximum amounts. The actual penalty can only be imposed in a court of summary jurisdiction. There are no infringement notices.
- The maximum penalty for an individual for the trespass-related offence that substantially obstructs business activity (without creating serious risk to others) is 50 penalty units (\$8,650), or 12 months imprisonment (but not both).

- This fine and imprisonment level are the same as the current penalty for trespassing in a residence under the *Police Offences Act 1935* (and double the penalty for trespass in other types of premises, or vehicles, under that Act). Setting the penalty at the same level as trespassing in a residence reflects that trespassing in a business premises or in relation to a business vehicle, where the trespass or acts arising intentionally obstruct business activity, merits a higher maximum penalty than trespass alone.
- The maximum fine and imprisonment level increases to 60 penalty units or 18 months if the conduct of the offence causes a serious risk (or 120 penalty units or 30 months for a second offence that causes serious risk, if the person has been previously convicted for an offence causing a serious risk under the Bill).
- In comparison of penalties, some conduct under the 2014 Act may have led to a fine of \$5,000 or 12 months or both, or up to \$50,000 or 5 years imprisonment, or both (depending on whether the charges were heard as an indictable or summary matter, whether damage was caused and so on).
- The maximum penalty for a body corporate for the trespass-related offence is 600 penalty units (\$103,800). In comparison, the highest penalty in the 2014 Act for a body corporate is \$250,000.
- The maximum penalty for a person or body corporate for intentionally and substantially obstructing business activity by obstructing use or construction of public thoroughfares and critical infrastructure is 30 penalty units (\$5,190).
- References to dollar figures above are based on the current penalty unit value.

### Revised powers

- The Bill appropriately revises the 2014 Act's police powers to:
  - arresting a person without warrant who the officer reasonably believes is committing, or has committed an offence against the Act. The police officer must reasonably believe an arrest is necessary for a specified purpose, such as to prevent continuation of the offence.
  - removing a person from business premises or a business vehicle who the officer reasonably believes is committing, or has committed an offence against the Act.
  - using reasonable force necessary to exercise powers and functions.
  - seizing and removing objects placed or used in contravention of the Act.
  - causing or carrying out activity to repair any damage caused to land.
- Compensation provisions under the Bill are now limited so a court may only order payment of costs of a business in relation to objects used in contravention of the Act, or repairing damage caused by such objects.

### Exceptions and defences

- Maintains protections for industrial action and trade union activity as follows:
  - conduct that is protected industrial action within the meaning of the *Fair Work Act 2009* of the Commonwealth; or

- clarifies protection for conduct that is otherwise lawful, and in connection with an activity organised for a trade union that relates to remuneration, terms or conditions, hours of work, working conditions, or safety.
- Maintains a defence if a defendant proves there was a lawful excuse.
- Maintains the exclusion from ‘business premises’ of hospitals, health facilities, prisons, detention centres, educational facilities, charities, volunteer and religious organisations, and any prescribed premises.
- Inserts a new protection for conduct that is authorised under a permit issued under section 49AB of the *Police Offences Act 1935*.
- Inserts a new protection that a person is not taken to obstruct business activity by reason only of affecting, or potentially affecting, public opinion.

## What aspects of the 2014 Act are no longer part of the new framework?

### Definitions: no longer specific to protesters

- Removal of references to protesters and protest activity.

### The 2014 Act’s offences and penalty provisions are removed

- Removal of all offences from the 2014 Act, including but not limited to:
  - the offence that a person must not contravene a police direction.
  - offences that are adequately provided for under other current law: including offences relating to damage to business premises or objects, issuing threats, and obstructing police.
- New offences are inserted as described above.

### A number of police powers are removed

- Removal of powers for police to give directions, such as not to commit an offence or contravene the Act for 3 months.
- Removal of arrest powers where an officer believed the person has committed an offence in that area within the last 3 months (new arrest powers are described above).
- Removal of provisions relating to a person who a police officer believes ‘is about to commit an offence’.
- Removal of police powers that are adequately provided for under other current law in appropriate circumstances: such as the power to demand proof of identity, and the power to direct a person to leave an area.

### Removed compensation provisions

- Removal of provisions for a court to order a person to pay costs of arrest or removal of the person to the Crown; or the financial loss of a business operator (a limited compensation provision is described above).

## When would the amendments commence?

The Bill provides the amendments commence on Royal Assent.