



3 March 2019

Department of Justice
Strategic Legislation and Policy
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By email: haveyoursay@justice.tas.gov.au

Re: Workplaces (Protection from Protesters) Amendment Bill 2019 (Tasmania)

Thank you for the opportunity to make a submission to the Department of Justice, Strategic Legislation and Policy on the Workplaces (Protection from Protesters) Amendment Bill 2019 (Tas) ('the Bill'), as it amends the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('the Act'). We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and the Centre for Crime, Law and Justice at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

We make two primary submissions.

First, despite the Bill's amendments to the Act, key provisions remain in breach of the implied freedom of political communication. We identify a series of concerns as to the breadth of the operation of these provisions that demonstrate it is not appropriate and adapted to a legitimate objective compatible with the constitutionally prescribed system of representative and responsible government.

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Second, even if the amended Act's provisions are not in breach of the implied freedom of political communication, a number of its provisions create criminal offences and provide for police powers that extend beyond the legitimate limits of the criminal law in a liberal democracy. We submit that if the Bill is to be enacted, the concerns that we outline in this submission should be addressed prior to the enactment of the Bill.

Ongoing targeting of protestors: While the Bill purports to remove the Act's targeting of protestors,¹ we submit that, when its practical operation is considered rather than simply its form, the amended Act remains focused on prohibiting *protest* activity that affects business operations. The removal of this focus on explicit protestors appears to be in direct response particularly to Justice Gageler's comments as to the discriminatory operation of the legislation against protestors in *Brown v Tasmania* [2017] HCA 43, which indicated that this operation contributed to his conclusion that the relevant provisions were not appropriate and adapted to meeting their indicated purpose of protecting legitimate business activities from protestor activities.²

We submit that the removal of the explicit reference to protestors in the Bill has not remedied the operationally discriminatory operation of the legislation, and that it will continue to affect the actions of protestors more so than other groups. In practice, and given the history of on-site protests in Tasmania, the burden created by the offences of the legislation will still almost exclusively fall on on-site political protests that are targeted at legislative or regulatory change.³ This can be demonstrated by reference to the groups of persons that Gageler J refers to in his judgment in *Brown*.⁴ His Honour refers to a group of protestors, a group of school children on an excursion, a group of recreational walkers on an organised hike, or a group of local residents rallying in support of the forest operations of Forestry Tasmania. The amended Act would no longer explicitly target the protestors. However, in its practical operation, because of the requirement of *intention* to impede business activities in the proposed ss 6(1), (3) and (6), the legislation would operate only against this group.

Our submission that the Bill's amendments to the Act are insufficient to overcome the invalidity of the provision held in *Brown* is based partly on the continued discriminatory operation of the law, as outlined above, in a way that targets political communication, which Gageler J noted in *Brown* brings with it a closer level of scrutiny.⁵ We have also identified a number of continuing issues with the measures in the legislation that demonstrate, we submit, many of the provisions are not appropriate and adapted to achieving their objective. These are:

¹ The Bill purports to remove the Act's focus on the protestors through the omission of the words 'protestors do not damage business premises or business-related objects, or prevent, impede or obstruct the carrying out of business activities on business premises' in the long title (clause 4 of the Bill), amending the short title of the Act (clause 5 of the Bill), removing the definition of protestor and engaging in protest activity in section 4 of the Act (clause 7 of the Bill), and replacing sections 6, 7 and 8 in Part 2 of the Act, directed at the Protection of Business from Protestors, with a new offence of impeding business activity (clause 11 of the Bill).

² See Gageler J [202]-[203].

³ See further [193] (Gageler J).

⁴ [221].

⁵ [202]-[203].

- (a) the lack of clarity as to the breadth of the definition of ‘impeding’ the carrying out of a business activity in the proposed offence in sections 6(1), (2) and (6) and section 7, and its concomitant deterrent effect on potential communications on political and government matters;
- (b) the lack of clarity as to when a person would be entering or remaining on premises in contravening an Act or a requirement, direction, or notice, imposed or issued under an Act in sections 6(2)(b) and 6(3);
- (c) the lack of an exemption for the offences in sections 6(1), (3) and (6) where the individual is engaging in otherwise lawful activity, such as conducting a public protest pursuant to a permit obtained under section 49AB of the *Police Offences Act 1935*;
- (d) the reversal of the onus of proof as to whether conduct is occurring on ‘business premises’, as is affected by section 5A by the introduction of ‘demarcated business premises’;
- (e) the failure to provide a clearer definition of business premises so as to determine with greater clarity the operation of the offences in section 6.

The remainder of this submission will now address each of these issues in turn.

‘Impeding’ business activity: The offences contained in sections 6(1), (2) and (6), and section 7 relating to impeding business activity, draw on the definition of ‘impede’ in the proposed section 3 of the Act, which is ‘to prevent, hinder or obstruct’.

The threshold for engaging these provisions remains unclear under the amendments. While some members of the Court indicated in *Brown* that the previous versions of the provisions, and their reference to ‘preventing, hindering or obstructing’ the use, by a business occupier in relation to the business premises, or a business related object on the premises’, should be interpreted narrowly,⁶ this remains unclear from the face of the legislation,⁷ despite the opportunity to amend it.

This lack of clarity as to when an individual might be in breach of the provisions is likely to create a deterrent, or ‘chilling effect’ on potential future communication on government and political issues.

While the removal from the primary legislation of broadly drawn police ‘move on’ powers is welcomed, and addresses many of the concerns raised by the judges in *Brown* as to the stifling effects of the police’s power to issue directions, the continuing power to arrest without warrant in the Bill based only on a reasonable belief that the person is committing or has committed an offence against a provision of the Act (clause 16 of the Bill, amending section 13 of the Act), remains. Indeed, this power has been *broadened* by the Bill. Under clause 16 of the Bill, subsection 13(4) of the Act is been removed, which limited the power of warrantless arrest to particular purposes, and limited the power to detain a person so arrested only for so long as is necessary to fulfil those purposes.

⁶ See *Brown* [71] (Kiefel CJ, Bell and Keane JJ), referring to the concession by the Tasmanian government in that case, based on the principle of legality and the *Acts Interpretation Act 1931* (Tas), that the term should be restricted to conduct which ‘substantially’ or ‘seriously’ hinders or obstructs business activities.

⁷ And note here Gageler J’s comments as to the potential width of the collation at [174].

Clarification needed in relation to entering or remaining on premises in contravention of an Act etc: One of the elements of the offence defined by proposed s 6(1) (intentionally impeding the carrying out of a business activity) is that the person is ‘not authorised to be on [the relevant] business premises’. This includes where the person is trespassing (s 6(2)(a)), or where entering or remaining on the premises ‘would be contravening *an Act* or a requirement, direction, or notice, imposed or issued under *an Act*’ (s 6(2)(b); emphasis added). This latter provision is vague and potentially broad. At a minimum, proposed s 6(2)(b) should be explicit and detailed about the types of requirements, directions or notices, and the particular Acts, which might operate to place a person in the category of ‘not authorised to be in business premises’. In addition, it would be preferable if proposed s 6(2)(b) was further amended to contain an express statement that entering or remaining is only ‘not authorised’ if the persons subjectively *knows* that their presence is contrary to a relevant Act.

The same submissions apply with equal force to the offence defined by proposed s 6(3) (being on or in a business vehicle to intentionally impeding the carrying out of a business activity).

No exemption for otherwise lawful activity: In relation to these two offences (ss 6(1) and 6(3)), as well as the offence under proposed s 6(6) – obstructing the ‘use or enjoyment of a public thoroughfare’ with the intention of impeding the carrying out of a business activity – s 6(7) provides an exemption for ‘industrial action’ (‘protected’ (s 6(7)(a)) and ‘lawful’ (s 6(7)(b))). This is an important safeguard in a proposed legislative regime that, if the bill is enacted, will impose significant restrictions on protest activity. However, we submit that it is under-inclusive. There are other types of organised public assembly for protest purposes that have traditionally been regarded as deserving of immunity from road/traffic obstruction offences. Specifically, proposed s 6(7) should be amended to make it clear that disruption caused by a ‘demonstration’ or ‘procession’ conducted in accordance with a permit obtained under s 49AB of the *Police Offences Act 1935* is not ‘carrying out an act’ for the purpose of proposed ss 6(1) and 6(3), and does not amount to ‘causing the use or enjoyment of a public thoroughfare to be obstructed’ for the purpose of proposed s 6(6). Further, as drafted, the proposed exemption provision (s 6(7)) does not apply to the offence created by proposed s 7: *threatening* to commit an offence under s 6 with the *intention* of impeding the carrying out of a business activity. It is possible, therefore, that a person could be charged with the s 7 offence where the conduct which s/he ‘threatens’ to undertake forms part of a lawful activity – whether protected/lawful industrial action, or a demonstration or procession for which a permit has been issued by a senior police officer. This gap in the coverage afforded by the s 6(7) safeguard should be remedied.

Reversal of burden of proof in relation to business premises: Section 5A(1) introduces the new concept of a ‘demarcated business premises’, and thereby extends the meaning of business premises (as defined in s 5). A ‘demarcated business premises’ is all or part of an area of land where there is a business premises, where the perimeter of the area of land is marked and signed, in ‘prescribed distances’ and in the ‘prescribed manner’. The Bill does not however, define or refer to any statutory source of the prescribed distances and manner of signage. Section 5A(2) provides that an area of land that is a demarcated business premises

is presumed to be ‘business premises’ for the purposes of the Act, in the absence of evidence to the contrary. The section functions to reverse the burden of proof from the prosecution to the accused to lead evidence that the area of land they were on was not a business premises.

One reading of the construction of s 5A(2) is that it intends to reverse the evidentiary burden of proof only, such that the accused putting the presumption triggered by demarcation in issue, need only raise a reasonable doubt about their guilt. On this reading, the provision still requires the prosecution to ultimately discharge the legal burden. However, s 5A(1) goes to defining and making out an essential element of the offences contained in s 6, that is, whether conduct is occurring on ‘business premises’. The reversal of proof in s 5A(2) thus places an unjustifiable burden on the accused and challenges the right to be presumed innocent and for the prosecution to discharge the legal burden of proof.

The reverse burden of proof should be removed from the amending legislation. It should remain with the prosecution to prove all elements of the offence. By virtue of s 5A(1) the owner of the business premises determines the nature and extent of the demarcation, and entails a set of propositions or state of affairs to which the prosecution ought to adduce evidence. We submit that proposed s 5A be removed and that the normal rules of evidence apply to whether all the elements of the offences in s 6 are made out. Whether a particular area of land was marked with signage, is properly a matter of evidence to be adduced by the prosecution.

Clearer definition of business premises required: It is clear that the Bill’s inclusion of ‘demarcated business premises’ was an attempt to address the issue that had been raised by a number of judges in *Brown*, that is the difficulty of determining when land is business premises, particularly in relation to the ‘forestry land’, as defined in s 5(1)(b) of the Act.

The definition of ‘business premises’ remains relevantly un-amended by the Bill. In the words of Kiefel CJ, Bell and Keane JJ, the principal practical problem under these definitions, is that for protestors ‘it will often not be possible to determine the boundaries of “business premises” or a “business access area”’. That problem arises because the term “business premises” is inapt for use with respect to forestry land. The definition of “business premises” with respect to forestry land does not provide much guidance. The question simply becomes whether a protester is in an area of land on which forest operations (a widely defined term) are being carried out. The vagueness of the definition of “business access area” compounds the problem.’⁸ They went on to explain that ‘The Protestors Act operates more widely than its purpose requires. It is principally directed to preventing protestors being present *within ill-defined areas in the vicinity of forest operations or access points to those areas*, whereas its purpose is similar to that of the FMA.’⁹

In our submission, and for the reasons outlined above, it is not an appropriate response to this dilemma to shift the burden of proof as to whether the forestry land is ‘business premises’ to the accused. Rather, the legislation must, with greater clarity, define the term ‘business premises’, particularly as it continues to relate to forestry land.

⁸ [67] and [73].

⁹ [140].

Yours sincerely,

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