

# Submission: *Workplaces (Protection from Protesters) Amendment Bill 2021*

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## **Summary**

The Tasmanian Government's attempts to restrict citizens' right to protest with the *Workplaces (Protection from Protesters) Amendment Bill 2021*, is unnecessary and problematic. The *Amendment Bill 2021* continues to preference businesses' ability to carry out work over the right of people to protest by making a broad range of peaceful protest activities illegal, with harsh penalties attached.

The nebulous definition of forestry land as a business premises has been retained, meaning that this legislation could continue to breach the freedom of political communication implied from the *Australian Constitution*.<sup>1</sup> The definition of a public thoroughfare is even more nebulous than forestry land as a business premises. This results in the offense covering a worryingly broad range of activities.

The Bill is unnecessary, as several offences already exist and are commonly used in order to protect businesses and their ability to continue work from protestors. For example, it is already an offence to enter or remain on land without the consent of the owner without a reasonable or lawful excuse.<sup>2</sup> This is an offence commonly used against protestors.<sup>3</sup>

The Tasmanian Government should not proceed with this legislation, protecting citizens' right to participate in their democracy through protest.

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<sup>1</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 6.

<sup>2</sup> *Police Offences Act 1935* (Tas), s 14B(1).

<sup>3</sup> See, e.g., Bob Brown Foundation (2021) *Media Release: Six women activists charged after courageous environmental protest this morning in Tasmania's north west*, [https://www.bobbrown.org.au/mr\\_1092021](https://www.bobbrown.org.au/mr_1092021)

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# Contents

Introduction .....	4
Anti-Protest Legislation in Tasmania .....	4
Right to Protest .....	5
Strong History of Protest in Tasmania .....	6
Flaws in the Workplaces Amendment Bill 2021 .....	8
Forestry Land as Business Premises .....	8
Public Thoroughfare as a Business Premises .....	9
Existing Offences Already Protect Businesses .....	9
Conclusion.....	11

# Introduction

We welcome the opportunity to make a submission on the *Workplaces (Protection from Protesters) Amendment Bill 2021 (Workplaces Amendment Bill 2021)*.

Protest is a fundamental way in which citizens can participate in their democracy. Tasmanians have a proud history of doing so through protest. Across Australia and the world, citizens' right to protest is recognised and protected. Yet, since 2014, the Tasmanian Government has sought to legislate new offences which target protestors with harsh penalties.

The Tasmanian Government's first attempt at this legislation – the *Workplaces (Protection from Protestors) Act 2014 (Workplaces Act 2014)* – was found by the High Court to impermissibly burden the freedom of political communication implied in the *Australian Constitution*.<sup>4</sup> The second iteration – the *Workplaces (Protection from Protesters) Amendment Bill 2019 (Workplaces Amendment Bill 2019)* – was voted down in the Legislative Council this year.

The *Workplaces Amendment Bill 2021* is the Tasmanian Government's third go at creating a law that restricts a broad range of protest through harsh penalties, with the aim of protecting business activities. Like previous iterations, the restrictions on protest are so broad that they could breach the implied freedom of political communication. Further, the penalties created are unnecessary, given that the offences which already exist in Tasmania that can be used against protestors who obstruct business activity.

The Australia Institute Tasmania recommends that the Tasmanian Government does not push forward with the *Workplaces Amendment Bill 2021*, instead protecting citizens' right to participate in their democracy through protest.

## ANTI-PROTEST LEGISLATION IN TASMANIA

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The *Workplaces Act 2014*, the legislation which the *Workplaces Amendment Bill 2021* seeks to change, aimed to deter people from engaging in protest which stopped business activities.<sup>5</sup> The legislation stipulated that a protestor could not do an act in a business premises or business access area if it hindered or obstructed the carrying out of a business activity.<sup>6</sup> If they did so, a police officer could direct them to leave the area, requiring them to stay away for up to three months.<sup>7</sup> If they remained in the area, or returned, this was an

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<sup>4</sup> *Brown v Tasmania* (2017) 261 CLR 328.

<sup>5</sup> *Workplaces (Protection from Protestors) Act 2014*, long title.

<sup>6</sup> *Workplaces (Protection from Protestors) Act 2014*, s 6(3).

<sup>7</sup> *Workplaces (Protection from Protestors) Act 2014*, ss 8(1), 11(1) and (2).

offence which was punishable by a fine of up to \$10,000 for an individual and \$100,000 for a body corporate.<sup>8</sup>

In the High Court decision *Brown v Tasmania*, a majority found that the prohibition on protestors from entering, or hindering or obstructing, business activity (forest logging) on business premises was invalid. The powers given to police to enforce and criminalise the prohibition on protestors was also invalid. This was because the provisions of the *Workplaces Act 2014* operated more widely than what their purpose of protecting business activities required.<sup>9</sup>

The Tasmanian Government resurrected the *Workplaces Act 2014* with the *Workplaces Amendment Bill 2019*, which similarly aimed to restrict the ability of citizens to protest in order to protect the ability of businesses to continue work.<sup>10</sup> The amendment retained the offences of intending to impede the carrying out of a business activity on business premises or public thoroughfare.<sup>11</sup> It also retained an offence for intending to carry out an act on a business vehicle which impeded business activity.<sup>12</sup> The penalties for these offences remained similarly harsh. Further, if a person threatened to impede a business activity they could be fined up to \$5,000.<sup>13</sup>

The Tasmanian Aboriginal Centre, the Tasmanian Greens, the Human Rights Law Centre, Civil Liberties Australia, Greenpeace, the Tasmanian Law Reform Institute, and the Bob Brown Foundation were all in opposition to the *Workplaces Amendment Bill 2019*.<sup>14</sup> It was widely criticised for bringing in unnecessary and harsh offences for protestors, and for not addressing the reasons given by the High Court for why the last iteration was invalid. Whilst the *Workplaces Amendment Bill 2019* passed the Tasmanian House of Assembly in November of 2019, it was defeated in the Legislative Council in March of this year.

## RIGHT TO PROTEST

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Citizens' right to protest is recognised in Australian and international law.

The High Court has determined that the *Australian Constitution*, in creating a representative and responsible government, implies that freedom of political communication is necessary to ensure the proper functioning of that government.<sup>15</sup> Therefore, the importance of

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<sup>8</sup> *Workplaces (Protection from Protestors) Act 2014*, s6(4) and 8(1).

<sup>9</sup> *Brown v Tasmania* (2017) 261 CLR 328.

<sup>10</sup> *Workplaces (Protection from Protestors) Amendment Bill 2019*, long title.

<sup>11</sup> *Workplaces (Protection from Protestors) Act 2014*, ss 6(1), (2) and (6).

<sup>12</sup> *Workplaces (Protection from Protestors) Act 2014*, s 6(3).

<sup>13</sup> *Workplaces (Protection from Protestors) Act 2014*, s 7.

<sup>14</sup> Haubrick (2021) *Anti-protest workplace bill defeated*, <https://www.greenleft.org.au/content/anti-protest-workplace-bill-defeated>; Department of Justice (2021) *Workplaces (Protection from Protestors) Amendment Bill 2019 - Have your say*, <https://www.justice.tas.gov.au/community-consultation/closed-community-consultations2/workplaces-protection-from-protesters-amendment-bill2019>

<sup>15</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1992) 177 CLR 106.

peaceful protest where it allows the expression of political opinion in Australia's democracy is recognised and protected under Australia's highest form of law; when a legislation's burden on the implied freedom of political communication is not reasonably appropriate or adapted to achieve its legitimate purpose it can be deemed invalid. This occurred with the first iteration of this legislation – the *Workplaces Act 2014*.<sup>16</sup>

The Australian Government has shown its support for citizen's rights to protest, by signing and ratifying the UN *International Covenant on Civil and Political Rights (ICCPR)*<sup>17</sup>, which secures the rights of freedom of expression, association and assembly (Articles 19 and 22, inter alia). If Australian states and territories do not uphold these rights it can create significant international pressure on the Australian Government. The *Workplaces Act 2014* attracted harsh criticism from UN Special Rapporteurs for disproportionately restricting peaceful assembly and expression.<sup>18</sup>

Across Australia, other jurisdictions such as Victoria, the Australian Capital Territory and Queensland have all recognised the importance of the right to expression, association and assembly, enacting legislation to protect them.<sup>19</sup> No other state or territory in Australia has imposed such harsh penalties for similar acts and restricts so broadly protest actions as the *Workplaces Amendment Bill 2019*.

## STRONG HISTORY OF PROTEST IN TASMANIA

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Protest has been an important way in which Tasmanians have voiced their opinions on political issues and influenced the democratic process.

Protests by citizens against the flooding of Lake Pedder, the Vietnam War, the damming of the Franklin River, the Tamar Valley Pulp Mill, the Iraq War and the School Strike for Climate are considered by many citizens as milestones in Tasmania's democratic history.

In the last year alone, protests have occurred across Tasmania on a diverse range of current political issues including changing the date of Australia Day, climate change, the Taliban's takeover of Afghanistan, salmon farming, sexual abuse and harassment of women and native forest logging.

When citizens express their opinions about political issues through protest, this can result in a change in policy, allowing citizens a direct means through which to participate in democracy. For example, the High Court has commented on the 'substantial history of ...

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<sup>16</sup> *Brown v Tasmania* (2017) 261 CLR 328.

<sup>17</sup> *International Covenant on Civil and Political Rights*. Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

<sup>18</sup> OHCHR (2014) *UN experts urge Tasmania to drop its anti-protest bill*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>

<sup>19</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

protests against forest operations in Tasmania', 37 of which between 2006 and 2017 resulted in protection of that area by government.<sup>20</sup>

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<sup>20</sup> *Brown v Tasmania* (2017) 261 CLR 328, p 402 and 346.

# Flaws in the Workplaces Amendment Bill 2021

The *Workplaces Amendment Bill 2021* again seeks to amend the *Workplaces Act 2014*, restricting citizens' right to protest.

The *Workplaces (Protection from Protestors) Amendment Bill 2021* changes the object of the *Workplaces Act 2014* to appropriately balancing the right to carry out business activities with the rights to freedom of movement, assembly and opinion.<sup>21</sup> But the *Amendment Bill 2021* continues to preference businesses' ability to carry out work over the right of people to protest by making a broad range of peaceful protest activities illegal, with harsh penalties attached.

Like the previous iteration, the *Workplaces Amendment Bill 2021* makes it an offence for a person to trespass on business premises and to intentionally perform an act which obstructs business activity there.<sup>22</sup> This has also been made an offence in relation to a business vehicle.<sup>23</sup> For individuals, the penalty for committing these offences has been reduced from 60 penalty units to 50 penalty units (still a fine of \$8,650) and from 18 months imprisonment to 12 months. The penalties for these offences for a body corporate have not changed, making them liable for 600 penalty units (a fine of \$103,800).<sup>24</sup>

## FORESTRY LAND AS BUSINESS PREMISES

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In *Brown v Tasmania*, the High Court considered that the broad definition of forestry land as a business premises meant that the attached offence impermissibly burdened the implied freedom of political communication in the *Australian Constitution*.<sup>25</sup> The nebulous definition of forestry land as a business premises has been retained, meaning that this legislation could continue to breach the freedom of political communication implied from the *Australian Constitution*.<sup>26</sup>

The Bill also reintroduces an offence for obstructing a business activity on a business premises whilst on public thoroughfare. This has remained at 30 penalty units (a fine of \$5,190).<sup>27</sup>

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<sup>21</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 6.

<sup>22</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 7.

<sup>23</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 7.

<sup>24</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 7.

<sup>25</sup> *Brown v Tasmania* (2017) 261 CLR 328, p 40.

<sup>26</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 6.

<sup>27</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 7.



## PUBLIC THOROUGHFARE AS A BUSINESS PREMISES

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What is a public thoroughfare is even more nebulous than forestry land as a business premises. This results in the offense covering a worryingly broad range of activities. It could extend to a person holding a placard at the Salamanca Market, handing out pamphlets outside a café, asking for a petition to be signed in a public park or filming on a public road or in public waters. This leaves open the possibility that this legislation breaches the implied freedom to political communication in the *Australian Constitution*.

The Bill also gives police officers broad, discretionary powers which allow them to arrest a person who they reasonably believe is committing or has committed an offence.<sup>28</sup> Further, they do not have to ask a person to ‘move on’ – with this direction not being complied with – before an arrest can be made. This creates serious difficulties for citizens in avoiding committing an offence, as well as police officers in enforcing it. Because of this, the legislation could continue to breach the implied freedom of political communication.

## EXISTING OFFENCES ALREADY PROTECT BUSINESSES

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Like the previous iterations of the legislation, the *Workplaces Amendment Bill 2021* is unnecessary, as several offences already exist and are commonly used in order to protect businesses and their ability to continue work from protestors.

It is already an offence to enter or remain on land without the consent of the owner without a reasonable or lawful excuse.<sup>29</sup> A person who commits this offence can be fined \$4,325 and/or imprisoned for up to 8 months.<sup>30</sup> This is an offence commonly used against protestors.<sup>31</sup>

It is also an offence to be riotous, offensive, disorderly, insulting, annoying, commit a nuisance or disturb the peace.<sup>32</sup> This is punishable by a fine or \$519 or up to 3 months imprisonment.<sup>33</sup>

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<sup>28</sup> *Workplaces (Protection from Protesters) Amendment Bill 2021*, s 6.

<sup>29</sup> *Police Offences Act 1935* (Tas), s 14B(1).

<sup>30</sup> Tasmanian Government Department of Justice (2021) *Value of Indexed Amounts in Legislation*, [https://www.justice.tas.gov.au/about/legislation/value\\_of\\_indexed\\_units\\_in\\_legislation](https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation)

<sup>31</sup> See, e.g., Bob Brown Foundation (2021) *Media Release: Six women activists charged after courageous environmental protest this morning in Tasmania’s north west*, [https://www.bobbrown.org.au/mr\\_1092021](https://www.bobbrown.org.au/mr_1092021)

<sup>32</sup> *Police Offences Act 1935* (Tas) s 13(1).

<sup>33</sup> *Police Offences Act 1935* (Tas) s 13(1); Tasmanian Government Department of Justice (2021) *Value of Indexed Amounts in Legislation*, [https://www.justice.tas.gov.au/about/legislation/value\\_of\\_indexed\\_units\\_in\\_legislation](https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation)

Additionally, a person cannot interfere or tamper with a motor vehicle, or they will be liable for a \$3,460 fine.<sup>34</sup>

Further, a police officer can direct a protestor in a public place to leave if they believe on reasonable grounds that that person has, is or is likely to commit an offence, obstruct the flow of pedestrians or vehicles, endanger the safety of another person or commit a breach of the peace.<sup>35</sup> If a person does not comply with this direction, they can be fined up to \$346.<sup>36</sup> This power is often used to remove protestors from an area.<sup>37</sup>

These offences allow protestors to be cleared from an area quickly and with penalty, allowing businesses to continue their work.

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<sup>34</sup> *Police Offences Act 1935* (Tas) s 371; Tasmanian Government Department of Justice (2021) *Value of Indexed Amounts in Legislation*,

[https://www.justice.tas.gov.au/about/legislation/value\\_of\\_indexed\\_units\\_in\\_legislation](https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation)

<sup>35</sup> *Police Offences Act (POA) 1935* (Tas) s 15B.

<sup>36</sup> Tasmanian Government Department of Justice (2021) *Value of Indexed Amounts in Legislation*,

[https://www.justice.tas.gov.au/about/legislation/value\\_of\\_indexed\\_units\\_in\\_legislation](https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation)

<sup>37</sup> See, e.g., Sato (2021) *Extinction Rebellion protesters blockade United Petroleum depot in New Town*, <https://www.themercury.com.au/news/hobart-south/extinction-rebellion-protesters-blockade-united-petroleum-depot-in-new-town/news-story/99a3fb722a3611c3cbc9d952ed3cb4a6>

# Conclusion

The *Workplaces Amendment Bill 2021* is another unnecessary, potentially unconstitutional and costly attempt to restrict citizens' right to protest.

In creating it, the Tasmanian Government again ignores citizens' right to participate in democracy through protest. This is recognised nationally and internationally, as well as locally, with Tasmanians having a proud history of protesting on important political issues.

Like the two other attempts before it, the *Workplaces Amendment Bill 2021* creates broad restrictions on citizens ability to protest, and harsh penalties for doing so. Because of this, it is possible that it continues to breach the implied freedom of political communication in the *Australian Constitution*. It is also unnecessary in order to protect businesses ability to continue work, given that there are already a range of offences which can be used against protestors where they hinder business activities.

The Tasmanian Government must respect citizens' right to participate in democracy through protest and not move forward with the *Workplaces Amendment Bill 2021*.