

**Submission
No 145**

**INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM
BILL 2019**

Organisation: NSW Council for Civil Liberties

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New South Wales
Council for Civil Liberties

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Submission regarding the
Right to Farm Bill 2019

1 October 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Contents

Right to Farm Bill 2019 (the Bill).....	4
Introduction.....	4
Contrary to core principles of criminal law	4
Broad application – not limited to farms	4
Chilling effect.....	6
Disproportionate and draconian	7
Draconian penalties.....	8
Lacking sufficient justification	8
Infringement of international law	9
Recommendations.....	9
Concluding comments	10
Annexure A – Joint Submission	12

Right to Farm Bill 2019 (the Bill)

Introduction

The NSW Council for Civil Liberties (CCL) joins with a number of other civil society organisations including unions, environment groups and civil liberties advocates in making the submission set out in Annexure A to this document.

CCL makes the following additional comments.

Contrary to core principles of criminal law

CCL is concerned by what would appear to be a 'crackdown' against free speech and basic principles of democratic governance.

The proposed legislation is draconian and disproportionate and might be said to infringe at least two of the four core principles of criminal law –

- that the criminal law should only be used to censure people who have committed substantial wrongdoing, and
- that laws be enforced with respect for proportionality.

This bill appears to be designed to discourage lawful demonstrations and protest contrary to the implied constitutional right to peaceful protest and its constitutionality is for that reason questionable¹.

Broad application – not limited to farms

The proposed amendments to the *Inclosed Lands Protection Act* 1901 (the Act) will have very broad application and disproportionately harsh penalties.

The application of the amendments proposed in the Right to Farm Bill 2019 will not be limited to activists entering or remaining on farmland as its title suggests — the offence of aggravated unlawful entry will capture anyone found to be 'hindering' the conduct of any business or 'undertaking' on 'inclosed land'.

Section 3 of the Act defines 'inclosed land' broadly as:

¹ *Brown v Tasmania* [2017] HCA 43

any land, either public or private, inclosed or surrounded by any fence, wall or other erection, or partly by a fence, wall or other erection and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised, including the whole or part of any building or structure and any land occupied or used in connection with the whole or part of any building or structure.

The erection of a temporary barrier would be sufficient to create 'inclosed land'.

The addition of the element of 'hindering' to the Act as proposed by the Bill, imposes a significantly lower threshold than the former test of 'interfering with' a business or undertaking in section 4B(1)(a). Hindering is not defined and is so broad as to capture passive, peaceful protests such as sit-ins.

What constitutes an 'undertaking' is not defined. Certainly it is not limited to farming or other profit-making activities.

The aggravated offences proscribed by the Bill will extend to people exercising their democratic right to peaceful protest by, for example, staging a sit-in within a building or worksite, and even peaceful protesters in a public place such as a street parade, where temporary barriers are erected around them, if their protest passively hinders any kind of undertaking within that inclosed land.

The legislation is broad enough to capture forestry, logging and other environmental protests such as those dealt with by the High Court of Australia in cases such as such as *Brown v Tasmania*² and *Commonwealth v Tasmania*³. Clearly, the protest movements that triggered these important legal challenges were critical to the development of environmental law in Australia. The breadth of the proposed laws and their application to forestry industries or even protests against illegal land-clearing on private farms, for instance, threaten the future organisation of important environmental protest.

The legislation is also broad enough to capture anti-fracking protests that commonly occur on private farms where coal-seam gas companies may operate.

² Ibid

³ (1983) 158 CLR 1

The law already prohibits trespass, so if the intent is to stop people unlawfully coming on to farmlands, these amendments are unnecessary.

Chilling effect

The objective of the aggravated offence provisions of the Bill is to stifle political communication about the organisation of environmental and animal rights protest, provided that the protest occurs within 'inclosed lands' and 'hinders' an 'undertaking'. The practical application of these provisions is to arrest first and sort out the legal consequences later. The direct effect of such laws thereby stifles political protest and achieves an objective that starkly contradicts the implied freedom of political communication ('the implied freedom', as outlined by the High Court in *Lange v ABC*⁴ and *McCloy v NSW*⁵).

If the legislation attempts to distinguish itself from more blatant encroachments against the implied freedom (see, for example, *Australian Capital Television v Commonwealth*⁶; *Brown v Tasmania*) by specifying that the activity must take place within inclosed lands, it should be noted that the High Court has had no previous difficulties in striking down legislation as constitutionally invalid when it interferes with an exercise of the implied freedom even where it takes place on private land. In *Coleman v Power*⁷, for instance, the implied freedom was applied to invalidate legislation and executive acts that interfered with political protest in a private shopping mall. In *Brown v Tasmania*, the implied freedom was applied to strike down legislation that interfered with political protest in shops and other places of forestry business. And in *ABC v Lenah Game Meats Pty Ltd*⁸ – a case which stands on all fours with the aggravated trespass offences in the present Bill – the implied freedom was applied to invalidate a charge of trespass against animal rights activists who filmed the interior of a possum meat processing plant.

Given this precedent, it is likely that the High Court would find that the implied freedom invalidates most arrests and charges contemplated by this Bill. The fact that the Parliament would consider passing such legislation, in direct contravention of constitutional law, shows, in the view of CCL, contempt for the High Court as well as basic civil liberties and political

⁴ (1997) 189 CLR 520

⁵ [2015] HCA 34

⁶ (1992) 177 CLR 106

⁷ (2004) 220 CLR 1

⁸ [2001] HCA 63

freedoms. It consolidates the impression that the objective of this legislation is to arrest first to stop protest and negotiate the constitutional law later.

CCL strongly opposes this legislation where it infringes fundamental constitutional civil rights and liberties, in particular, the implied freedom of political communication.

Disproportionate and draconian

The legislation is disproportionate to the conduct that it seeks to prevent: the mere 'incitement' or steps preparatory to summary offending and other minor offences. These offences do not actually require the commission of the substantive offence of trespass or unlawful damage etc. The ultimate consequence of the proposed offences is to criminalise conduct for an offence that may never eventuate.

Such criminalisation is beyond justification, particularly in respect to offences as minor and trivial as trespass and hindering an undertaking. Such offences are the subject of summary criminal prosecution in every local court across the country on every day of the working-week. In this respect, the proposed legislation is draconian and disproportionate and might be said to infringe at least two of the four core principles of criminalisation, 'that the criminal law should only be used to censure persons for substantial wrongdoing' and 'that laws be enforced with respect for proportionality'.⁹

The criminalisation of mere preparatory offences or 'pre-crime' is generally only acceptable in liberal democracies when reserved for offending with the potential for significant societal damage – eg terrorism, environmental and industrial catastrophe. To criminalise steps preparatory to the mere offence of trespass in these cases is to wield the proverbial sledgehammer against a half-cracked pistachio. In theoretical terms, these laws apply the legal notion of 'precaution', intended to frame potentially catastrophic preparatory actions, to a petty criminal context. The precautionary principle is clearly inappropriate here. As criminal law academic Lucia Zedner has commented, outside of offences that have the potential for mass-scale damage,

the mentality of precaution feeds on existing insecurities and gives way to the exercise of fevered bureaucratic imaginings. The consequence is that old 'certainties' of risk have in

⁹ Andrew Ashworth, 'Is the criminal law a lost cause' (2000) 116 *Law Quarterly Review* 225, 225-6.

*significant measure been usurped by uncertainty as a justification for action ... It is our not knowing, our inability to know or unwillingness to prove what we think we know that provides the reason to act before that unknown threat makes itself known.*¹⁰

CCL strongly opposes the criminalisation of acts that are merely preparatory to the commission of minor offences. This is an impost on basic human freedom and is clearly disproportionate to the desired legislative ends.

Draconian penalties

The newly proposed penalties are unjustifiably and disproportionately harsh. Until the 2016 amendments, the applicable fine was \$550. The Bill increases the maximum penalty for the aggravated offence to \$22,000 and 3 years imprisonment.

Although the intent of the Bill may be to shut down protest, draconian penalties do not act as a general deterrent as research has consistently shown, so the harsh penalties proposed are unlikely to prevent people from exercising their right to peaceful protest.

Lacking sufficient justification

'Public safety' is a common and legitimate justification for laws that infringe the implied freedom of political communication: see for instance, *Levy v Victoria*¹¹ (involving an animal rights protest at national parks during duck hunting season) and *Clubb v Edwards*¹² (involving a safe zone from pro-life protestors at abortion clinics).

It is noted that farmers and National Party MPs have argued that environmental and animal rights protests on private farms (particularly meat processing plants) pose a risk to public health and safety. There is, however, little evidence to support the public health and safety argument with respect to the animal rights protestors targeted by this Bill. No government reports, such as CSIRO opinions, appear to have been sought. To the contrary, photographic evidence exists showing that some protestors, implicated in the various 'sit-in' protests at a

¹⁰ Lucia Zedner, 'Fixing the Future?', in McSherry et al (eds), *Regulating Deviance* (Hart Publishing, 2009), 15.

¹¹ [1997] HCA 31

¹² [2019] HCA 11

meat processing plant in April 2019, were wearing hair-nets and coveralls and other safe food processing outfits¹³.

Certainly, it is difficult to see how the mere act of 'incitement' could ever contaminate a food source.

There is no safety justification for the harsh penalties proposed in the Bill.

CCL calls upon the proponents of the Bill to produce and make publicly available, evidence to show how public protests of the kind that occurred in April 2019 pose a threat to public safety and food contamination.

Should the proponents be able to produce such evidence, then it is recommended that the offence provisions be amended to include an additional element. This element would involve the commission of an offence 'in such a manner as to intentionally or recklessly threaten food safety'. The prosecution would be required to prove this additional element beyond reasonable doubt.

Infringement of international law

The Bill violates a number of human rights obligations under the International Covenant on Civil and Political Rights (ICCPR): the rights to peaceful assembly and freedom of association, including through trade unions as well as freedom of political expression.

The various international instruments permit their provisions to be overridden by laws if the laws are necessary, justified and proportionate to achieving a legitimate purpose. For the reasons stated above, CCL does not consider the Bill to be necessary, justified or proportionate to achieving a legitimate purpose.

Recommendations

CCL makes the following recommendations in relation to the Bill:

¹³ See Annexure B for copy of photographs courtesy of *The Guardian*, 'Vegan protesters raid farms and stage blockades around Australia – video', 7 April 2019: <https://www.theguardian.com/australia-news/video/2019/apr/08/veganprotesters-raid-farms-and-stage-blockades-around-australia-video>

- 1 The Committee should seek and consider any legal advice that has been provided to the NSW Government on the impact of the judgement of *Brown v Tasmania* on these amendments.
- 2 Before any amendments are made to expand the offence of aggravated trespass and significantly increase the penalties, the review into the 2016 amendments to *the Inclosed Lands Protection Act 1901* should be completed and released for public consultation.
- 3 The Bill should be rejected, or at the least amended to ensure that:
 - It does not apply to a person who is engaged in a genuine peaceful demonstration or protest
 - It does not increase the already considerable penalties for aggravated unlawful entry on to inclosed lands
 - It does not criminalise people who encourage others to participate in a peaceful protests
 - It does not apply to a union official or delegate undertaking worksite visits or inspections
 - It excludes prosecution for directing, inciting, procuring or inducing the commission of offences
- 5 Should evidence be made publicly available showing how public protests of the kind that occurred in April 2019 pose a threat to public safety and food contamination, then the offence provisions be amended to include an additional element. This element would involve the commission of an offence 'in such a manner as to intentionally or recklessly threaten food safety'. The prosecution would be required to prove this additional element beyond reasonable doubt.
- 6 The Bill should be rejected because it infringes international law and is unnecessary, unjustified and disproportionate to achieving a legitimate purpose.

Concluding comments

CCL is proud that Australia has, recently, become an international leader in protecting freedom of speech and expression. To remain at the forefront of these issues, the NSW Parliament should not proceed with these reactionary laws.

We thank you for your consideration of this submission.

This submission was written by Pauline Wright, President of NSWCCCL, with Eugene Schofield-Georgeson, Vice President.

Yours faithfully,

Pauline Wright

President | NSW Council for Civil Liberties

1 October 2019