

Secretary
Portfolio Committee No. 4 – Industry
Parliament of New South Wales

1 October 2019

Dear Committee

Right to Farm Bill 2019

We write to express our deep concern that the Right to Farm Bill 2019 (the **Bill**) will unfairly and unreasonably impact on peoples' freedom to peacefully protest in New South Wales. Although touted as a law to protect agricultural activity, the breadth of the provisions is significantly broader and goes to fundamental democratic issues such as our rights to stand together and speak out on issues we care deeply about.

Provisions that restrain protest rights

The Bill introduces provisions that would have a chilling effect on peoples' ability to organise, and their willingness to engage in, peaceful protest. It does so by:

- **New breadth of conduct:** Making the vague, ambiguous and potentially minor act of “hindering” a business an aggravating circumstances for the offence of unlawful entry on inclosed lands (section 4B(1)(a)). Hindering is not defined, but its application is conceivably very broad and encompasses singing or giving speeches via amplification that could, if heard by people in a business, disrupt that businesses.
- **Increased penalties, including for being with two or more people:** Dramatically increasing the penalties for “aggravated unlawful entry on inclosed lands” from \$5,500 to \$22,000 and adding the possibility of a three year term of imprisonment in circumstances where the offender is accompanied by two or more people (section 4B(1)). These are huge increases in penalties with no justification as to why such large penalties are required, particularly when penalties were only increased as recently as 2016.
- **Secondary offences of incitement:** Creating an offence of directing, inciting, procuring and inducing the commission of an offence against section 4B, with a maximum penalty of 12 months imprisonment (section 4C). This provision could deter people from organising peaceful

protests or encouraging friends to attend protest activity if by doing so they could fall foul of such provisions.

The difficulty of the above provisions is compounded by the definition of “Inclosed land.” That term is very broadly defined and includes public land (section 3). It seems to require only that the land’s boundaries be surrounded by something that allows the boundaries to be defined, including temporary boundaries.

The constitutional freedom of political communication: *Brown v Tasmania*

The Bill raises significant questions concerning the implied freedom of political communication in the Australian Constitution, many of which were considered by the High Court in *Brown v Tasmania*.¹ The Human Rights Law Centre intervened in that case in support of the freedom to protest and of political communication.

Brown concerned Tasmanian anti-protest laws, the *Workplaces (Protection from Protestors) Act* 2014 (Tas), that included a range of provisions that prohibited people from taking part in protest activities in or around business premises, including on forestry land.

There are a few key principles and propositions from *Brown* that bear upon the Bill.

- It is important that environmental protest being held *onsite* in order to bring about political and legislative change to protect the environment. In *Brown*, some 37 protests were identified that had resulted in legislative or regulatory protection.²
- Protests about the environment are a form of political communication that is protected in the constitution.
- A law can, through a combination of vague offences, police powers and harsh penalties have a deterrent effect on legitimate protest.
- Although it is legitimate for governments to protect businesses and their operations from damage and disruption from protesters engaged in particular types of protests, the laws created to do so must be reasonably appropriate and adapted to suit that purpose.

In our view, the Committee ought to closely inquire into the extent to which the Bill would prohibit onsite environmental protests, the likes of which were found to be of critical constitutional importance in *Brown*.

We have not had time to undertake a comprehensive analysis of the Bill from a constitutional perspective, but we consider there are real risks the Bill could burden the implied freedom of political communication in a manner that is unconstitutional.

Of course, the Bill will also impact on protest activity that is not related to the environment. To the extent that such activity concerns matters that are issues at state and federal elections, they may also be protected by the implied freedom. The Committee ought to consider the extent to which this Bill will silence, prevent and deter protest and political communication in a broader sense.

¹ [2017] HCA 43.

² *Ibid* at [33].

HRLC's Recommendations

We endorse the recommendations put in the attached joint submission prepared by environment groups, human rights and civil liberties organisations (Appendix A).

Recommendation 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 the provisions in the Bill.

Recommendation 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.

Recommendation 3: The Bill should be 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 onto 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

We would be pleased to discuss this submission with you further.

Yours sincerely



Emily Howie

Legal Director

Appendix A: Joint submission prepared by environment groups, human rights and civil liberties organisations

Submission on the Right to Farm Bill

We welcome the opportunity to participate in this Committee's Inquiry to review the Right to Farm Bill 2019 (the 'Bill').

The right to protest is fundamental to a healthy democracy. Throughout history, peaceful protest has played a vital role in securing legal rights and workplace protections that are now properly regarded as essential to a decent society. Peaceful protest has also led to the protection of some of Australia's most prized agricultural land from mining and fracking, and the declaration of some of Australia's best-loved national parks. Now, the right to protest is seriously threatened by this Bill.

Despite being called the Right to Farm Bill, the Bill's anti-protest measures go far beyond farming. The Bill nominally seeks to stop animal rights protests on farms, but in reality attacks people's right to engage in peaceful protest in any enclosed space - including schools, offices, worksites, banks, and even on public land. It contains extreme measures designed to shut down dissent.

The Bill increases the fine for anyone who 'enters inclosed lands without permission' or stays after being asked to leave and 'hinders' a business when they do so, from \$5,500 to \$22,000 and brings in a new three-year jail sentence for the offence. This is occurring only three years after the penalty for this offence was increased tenfold from \$550.

The Bill amends the offence from interfering with the conduct of the business while trespassing to simply 'hindering' the conduct of a business while trespassing – a very low threshold to trigger draconian jail penalties

The definition of 'inclosed lands' is so broad that it captures any land with a defined boundary, such as any building, a forestry coupe with a fence, land designated for coal or gas mining, or a work site. It would appear to include even public land closed off with temporary barricades.

The definition of hindering a business is similarly broad and would capture many forms of peaceful protest, such as a sit-in at a company's corporate headquarters, a protest by knitting nannas to protect prime agricultural land from CSG development, refugee supporters' protests at hospitals, and even union officials' and members' activities on a work site.

Perversely, the legislation could end up sending farmers to jail. Farmers have been at the frontline of the movement to stop inappropriate coal and gas developments which have led to policy and legislative changes. If, for example, farmers decided to stage a sit-in in a supermarket in protest against low milk prices, or in a bank in protest against the way loans are managed, under this legislation they will now face up to 3 years jail.

The Bill also introduces a new offence of directing, inciting, procuring or inducing the commission of the aggravated offence, which would criminalise the act of organising a peaceful protest. This new offence is so broadly worded that it would mean that if someone posted on social media encouraging their friends to attend a peaceful protest they could face up to 12 months in jail.

We are very concerned that these measures constrain or undermine the right to peaceful protest as implied in the Commonwealth Constitution and affirmed in the case of *Brown v Tasmania* [2017] HCA 43.

Recommendation 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.

We are also concerned that these changes are occurring with limited public consultation or debate. When the penalties for aggravated trespass were increased tenfold as part of the Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016, a specific amendment was moved by the Shooters, Fishers and Farmers Party and adopted by the parliament to ensure a statutory review of these changes occurred within 3 years. This review must “determine whether the policy objectives of those amendments remain valid and whether the provisions, as amended, remain appropriate for securing those objectives.”

Recommendation 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.

The organisations supporting this submission join with unions, environment groups, human rights and civil liberties organisations who oppose the disproportionate and anti-democratic elements of this legislation.

Recommendation 3: The Bill should be 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 onto 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